

FEB 1980

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION  
FILED

DOCKET NO. 338 Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JAN 10 1980

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION  
PATRICIA D. HOWARD  
CLERK OF THE PANEL

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION

John G. Stemmons v. United States of America  
N.D. Oklahoma, C.A. No. 79-710-B

80-0297

FILED

JAN 30 1980

CONDITIONAL TRANSFER ORDER

JAMES F. DAVEY, Clerk

On February 28, 1978, the Panel transferred 26 related civil actions to the United States District Court for the District of the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 500 additional actions have been transferred to the District of the District of Columbia. With the consent of that court, all such actions have been assigned to the Honorable Gerhard A. Gesell.

It appears from the pleadings filed in the above-captioned action that it involves questions of fact which are common to the actions previously transferred to the District of the District of Columbia and assigned to Judge Gesell.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68 (1978) the above-captioned tag-along action is hereby transferred to the District of the District of Columbia on the basis of the hearings held on January 27, 1978, May 26, 1978, September 29, 1978, November 1, 1978, March 23, 1979 and April 27, 1979. and for the reasons stated in the opinions and orders of February 28, 1978, 446 F. Supp. 244, July 5, 1978, 458 F. Supp. 648, January 16, 1979, 464 F. Supp. 949, and with the consent of that court assigned to the Honorable Gerhard A. Gesell.

This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the District of the District of Columbia. The transmittal of this order to said Clerk for filing shall be stayed fifteen days from the entry thereof and if any party files a Notice of Opposition with the Clerk of the Panel within this fifteen day period, the stay will be continued until further order of the Panel.

THIS IS A TRUE COPY  
ATTEST  
Patricia D. Howard  
Clerk of the Panel on Multidistrict Litigation

United States District Court  
The District of Columbia  
A TRUE COPY

JAN 28 1980

Patricia D. Howard  
Clerk of the Panel

FOR THE PANEL:

Patricia D. Howard  
Patricia D. Howard

4 1980

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION  
FILED

DOCKET NO. 330 Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JAN 10 1980

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

PATRICIA D. HOWARD  
CLERK OF THE PANEL

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION

FILED

Fleet Malone, etc. v. United States of America,  
N.D. Oklahoma, C.A. No. 79-709-E 00-1270

JAN 30 1980

CONDITIONAL TRANSFER ORDER

JAMES F. DAVEY, Clerk

On February 28, 1978, the Panel transferred 26 related civil actions to the United States District Court for the District of the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 500 additional actions have been transferred to the District of the District of Columbia. With the consent of that court, all such actions have been assigned to the Honorable Gerhard A. Gesell.

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This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the District of the District of Columbia. The transmittal of this order to said Clerk for filing shall be stayed fifteen days from the entry thereof and if any party files a Notice of Opposition with the Clerk of the Panel within this fifteen day period, the stay will be continued until further order of the Panel. the stay is filed and this order becomes effective

JAN 28 1980

FOR THE PANEL:

*Patricia D. Howard*  
Patricia D. Howard

Patricia D. Howard  
Clerk of the Panel

ATTACHED  
4-9 IS A TRUE COPY  
Patricia D. Howard  
Clerk, Judicial Panel on  
Multidistrict Litigation

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HERMAN L. MANN, et al.,

Defendants.

No. 78-C-408-BT

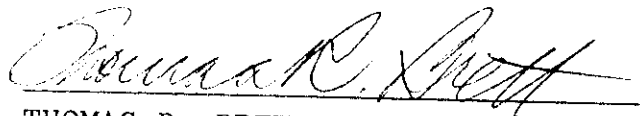
**FILED**

JAN 29 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

J U D G M E N T

On this 29th day of January, 1980, judgment is hereby entered in accordance with the Findings of Fact and Conclusions of Law filed this date.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
JAN 29 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

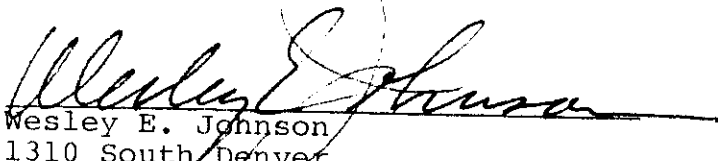
JUANITA STEWART, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
AFFILIATED FOOD STORES, INC., )  
an Oklahoma corporation, )  
 )  
Defendant. )

NO. 79-C-357-E


JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The plaintiff, Juanita Stewart, and the defendant, Affiliated Food Stores, Inc., advise the court of a settlement agreement between the parties and pursuant to Rule 41(a)(1)(ii), F.R.C.P., jointly stipulate that the plaintiff's action be dismissed with prejudice.

Dated this 28 day of January, 1980.

  
Wesley E. Johnson  
1310 South Denver  
Tulsa, Oklahoma 74119  
(918) 587-9451

Attorney for Plaintiff

  
J. Douglas Mann  
ROSENSTEIN, FIST & RINGOLD  
525 South Main Street, Suite 300  
Tulsa, Oklahoma 74103  
(918) 585-9211

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

APR 29 1980

JOE DAVID DICKERSON,

Plaintiff,

-vs-

MACHINERY, INC.,  
a Missouri Corporation,

Defendant.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

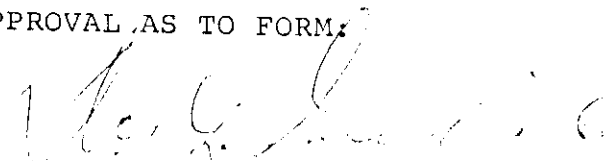
No. 79-C-125-aE

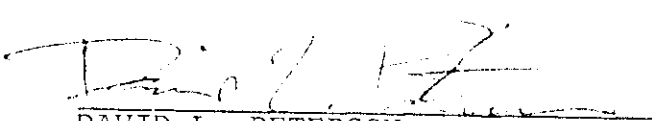
ORDER OF DISMISSAL

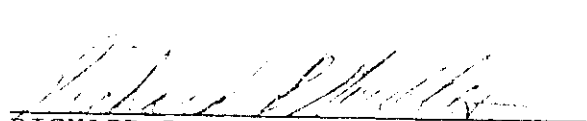
Based upon the Stipulation of Dismissal entered herein,  
it is hereby ordered that this cause is dismissed with  
prejudice to the refiling thereof.

\_\_\_\_\_  
JUDGE JAMES O. ELLISON

APPROVAL AS TO FORM:

  
\_\_\_\_\_  
DON L. GILDER

  
\_\_\_\_\_  
DAVID L. PETERSON  
Attorneys for Plaintiff

  
\_\_\_\_\_  
RICHARD B. NOULLES  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE **F I L E D**  
NORTHERN DISTRICT OF OKLAHOMA

JAN 29 1980 CS

MIAMI STONE, INC.,

Plaintiff )

vs. )

THORN, INC.,

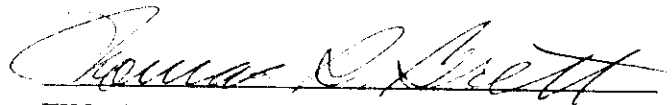
Defendant )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 78-C-596-BT ✓

J U D G M E N T

On this 29th day of January, 1980, judgment is hereby entered in accordance with the Findings of Fact and Conclusions of Law filed this date.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAMES C. WHITE,

Plaintiff,

v.

JOSEPH A. CALIFANO, JR.,  
Secretary of Health,  
Education and Welfare,

Defendant.

No. 79-C-15-C

**FILED**

JAN 28 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT

This matter comes on for consideration on the Findings and Recommendations of the Magistrate. The Court has reviewed the file, the briefs and the recommendations of the Magistrate and being fully advised in the premises finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education and Welfare denying him disability benefits and supplemental security income, provided for in Sections 216, 223, 1611 and 1614 of the Social Security Act, as amended. He asks that the Court reverse this decision and award him the benefits he seeks.

The matter was first heard by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued July 26, 1978. The Administrative Law Judge found that plaintiff was not entitled to disability benefits or supplemental security income. Thereafter, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on November 2, 1978, issued its findings that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the plaintiff. Thus the decision of the Administrative Law Judge became

the final decision of the Secretary of the Department of Health, Education, and Welfare.

Plaintiff contends that the Secretary's decision is incorrect and that the record supports his claim of disability. The Secretary's denial was predicated on his finding that although plaintiff "is not able to do work requiring medium or greater physical ability, \* \* \* he is otherwise able to function in a normal manner both mentally and physically \* \* \* he would be able to do jobs such as bench assembly work, toll booth attendant, school guard, or self-service station attendant." (Tr. 23-24)

Plaintiff argues that the Secretary failed to meet his burden of proof after the plaintiff had met his initial burden of demonstrating his inability to return to his previous employment. Plaintiff further claims that the Administrative Law Judge and the vocational expert, Minor W. Gordon, Ph.D. failed to take into account the claimant's testimony that after two hours of sitting or standing, the claimant is required to lie down. Plaintiff concludes that because the Plaintiff could not work without having to lie down every two hours, that there were not jobs available for Plaintiff to perform.

Dr. Gordon testified that he had access to Mr. White's file prior to the hearing; that he had been present throughout the hearing (during which hearing Mr. White testified); that he was familiar with the documentary evidence, the testimony taken at the hearing, Mr. White's background, working experience and skills. He concluded that Mr. White would not be able to return to his former employment because of his disability; but that there was sedentary work including "assemblers assembling fishing rods and reels" and service occupations such as school guard and toll booth



attendants which Mr. White could perform. Transcript, Pages 59-63.

The Administrative Law Judge found from the medical evidence, including the reports of Worth M. Gross, M.D., Marilyn E. Lenz, M.D., John A. Brasfield, M.D. and John D. Dague, M.D., together with the testimony of the claimant and Dr. Gordon that the claimant was not able to do work requiring "medium or greater physical ability" but would be able to do jobs such as "bench assembly work, toll booth attendant, school guard, or self-service station attendant." Apparently, the Administrative Law Judge did not believe that claimant would be prevented from obtaining employment even though Plaintiff testified that he could not work for more than two hours at a time without lying down.

The administrative record reveals that plaintiff was 50 years old in September 1976 when he alleges he became unable to work. He has an eighth grade education with a work history of manual labor.

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as:

"more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relas. Bd. v. Columbian Enameling & Stamping Co. 306 U.S. 292, 300 (1939), the Court, interpreting what constitutes substantial evidence, stated:

"It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberry v. Finch, *supra*; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Cellebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See, Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F.Supp. 83 (D.S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the Administrative Law Judge applied the correct legal standards in making his findings on Plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the act:

1. That the physical impairment has lasted at least twelve months that prevents him engaging in substantial gainful activity; and

2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C. § 423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because such findings are based upon the correct legal standards, it is the determination of the Court that Plaintiff is in fact not entitled to benefits under the Social Security Act. Judgment is so entered on behalf of the Defendant.

Dated this 28<sup>th</sup> day of January 1980,  
1980.

  
H. DALE COOK  
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

BOBBIE E. MORSE,

Plaintiff,

vs.

ILLINOIS MUTUAL LIFE AND  
CASUALTY COMPANY, a mutual  
legal reserve life insurance  
company, a foreign corporation)

Defendant.

No. 79-C-642-D

FILED


JAN 28 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

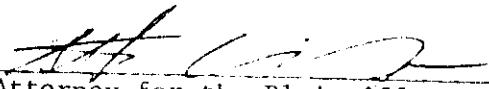
ON this 25 day of January, 1980, upon the written application of the parties for a Dismissal With Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same hereby is dismissed with prejudice to any future action.

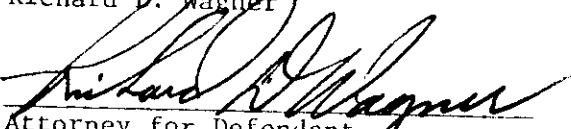
  
JUDGE, DISTRICT COURT OF THE UNITED  
STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

STEPHEN C. WOLFE

  
Attorney for the Plaintiff

KNIGHT, WAGNER, STUART & WILKERSON  
Richard D. Wagner

  
Attorney for Defendant

## United States District Court

JAN 28 1960

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk  
U. S. DISTRICT COURTKatherine B. Lipp, Administratrix of  
Estate of Adam Shane Lipp, deceased

CIVIL ACTION FILE NO. 79-C-49-E ✓

Plaintiff,

vs.

Walker Manufacturing Company, and Snap-On Tools  
Corporation,

Defendants.

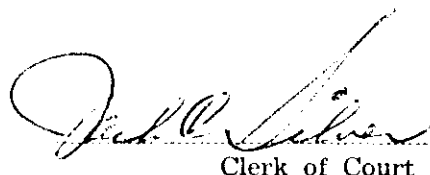
JUDGMENT

This action came on for trial before the Court and a jury, Honorable James O. Ellison  
, United States District Judge, presiding, and the issues having been duly tried and  
the jury having duly rendered its verdict, for the defendants.

It is Ordered and Adjudged that the Plaintiff take nothing and that the  
defendants recover of the Plaintiff their costs of action.

Dated at Tulsa, Oklahoma  
of January , 19 80.

, this 28th day



Clerk of Court

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE JAN 28 1980  
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JOY SPRADLING ROTARY DRILLING, INC. )

Plaintiff, )

vs. )

No. 78-C-621-E

NATIONAL UNION FIRE INSURANCE COMPANY )  
OF PITTSBURG, PA., )

Defendant. )

ORDER OF DISMISSAL

The motion of Plaintiff for Dismissal of the above entitled action without prejudice came on regularly for hearing this 24th day of January, 1980;

And it appearing that the Defendant in his answer makes no counterclaim against Plaintiff and will not be substantially prejudiced by such dismissal; therefore,

IT IS ORDERED that the above entitled action, and it is hereby dismissed without prejudice; and

IT IS FURTHER ORDERED that pursuant to that order dated January 9, 1980 that the Defendant by stipulation has agreed to waive any claims for costs, including attorneys fees.

Done this 24th day of January, 1980.

S/ JAMES O. ELLISON

---

U.S. District Judge

**FILED**

7 JAN 28 1960

NO. 79-C-604-E

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Respondents.

- (1) Instruction Number 2 to the jury was erroneous in that it instructed on a charge not specifically alleged in the information;
- (2) Instruction Number 2 was erroneous in that it stated that specific intent could be inferred from the fact of the killing;
- (3) The trial court erred in failing to instruct the

- jury that "no person can be convicted of murder ... unless the death of the person alleged to have been killed by the accused are [sic] each established as independent facts beyond a reasonable doubt.";
- (4) Instructions Number 2, 3, 5 and 6 are in contravention of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Sandstrom v. Montana, \_\_\_\_\_ U.S. \_\_\_\_\_, 47 U.S.L.W. 4719 (June 18, 1979), in that they instructed on felony murder and that the evidence failed to prove that the murder was committed during the commission of another independent felony; and
- (5) That there was insufficient evidence to sustain the conviction.

The Response was filed on October 18, 1979, and thereafter the transcript of the state court proceedings was received. The Court has reviewed the entire file, including the transcript of the state court proceedings, and concludes that the case is now ready for dispositive ruling.

In Townsend v. Sain, 372 U.S. 293 (1963), the Supreme Court laid down the test applicable to a determination of whether the petitioner was entitled to an evidentiary hearing:

We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313. See also 28 U.S.C. §2254(d); Rule 8, Rules Governing §2254 cases.

In reviewing the record, under the test of Townsend, the Court finds that an evidentiary hearing is not necessary.

In Sandstrom v. Montana, \_\_\_\_\_ U.S. \_\_\_\_\_, 47 U.S.L.W. 4719 (June 18, 1979), the trial judge instructed the jury that



"[t]he law presumes that a person intends ordinary consequences of his voluntary acts." In that case, the defendant admitted to the fact of the killing, but denied that he did so "purposely or knowingly," which, under Montana law, was a necessary element of the crime of "deliberate homicide." The Supreme Court held such an instruction to be unconstitutional, as violative of the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

In the instant case, the full text of Instruction Number 2 is as follows:

You are instructed that homicide is murder when perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of some other human being.

A design to effect death is inferred from the fact of the killing, unless the circumstances raise a reasonable doubt as to whether such design existed. A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution.

However, if you find the homicide was accomplished while the Defendant was engaged in the commission of a felony, it is not necessary to find that there was a premeditated design to effect death.

Tr. 256. At trial, the state's evidence showed that the victim was a 70 year old man with a pre-existing heart condition. His body, the evidence shows, was found bound with an electrical cord and with a wet towel tied over his face and mouth. There was also evidence of a bruise on his forehead. There was evidence that property had been taken from the decedent's home. There was testimony that the physical and emotional stresses produced by the situation affected the decedent's heart, thereby leading to his death.

In the instant case, the language of Instruction Number 2 does not raise constitutional questions as did the instruction in Sandstrom. There, under Montana law, the intent of the accused was an essential element of "Deliberate Homicide." Under the applicable Oklahoma law, however, a design on the part of the accused to effect death is not an element of

Murder in the Second Degree when the homicide is perpetrated in the commission of a felony, see Okla. Stat. tit. 21, §701.2(3) (repealed, 1976; now see Okla. Stat. tit. 21, §701.8); Wade v. State, 581 P.2d 914, 916 (Okla. Crim. 1978), and the jury was so instructed. Tr. 256, 257. Sandstrom, supra, is, therefore, inapplicable, and the evidence adduced at trial was clearly sufficient to meet the test of Jackson v. Virginia, \_\_\_\_\_ U.S. \_\_\_\_\_, 47 U.S.L.W. 4883 (June 28, 1979).

As to Petitioner's remaining contentions, they merely raise questions of trial errors for which habeas corpus relief is not available unless exceptional circumstances are present. In Gillihan v. Rodriguez, 551 F.2d 1182 (Tenth Cir.), cert. denied, 434 U.S. 845 (1977), the court said:

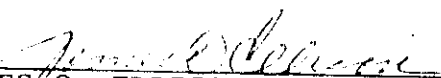
habeas corpus is not available to set aside a conviction on the basis of erroneous jury instructions unless the error has such an effect upon the trial as to render it so fundamentally unfair that it constitutes the denial of a fair trial in the constitutional sense.

551 F.2d at 1192, quoting Linebarger v. Oklahoma, 404 F.2d 1092 at 1095 (Tenth Cir. 1968), cert. denied, 394 U.S. 938 (1969). See also Brinlee v. Crisp, 608 F.2d 839, 854 (Tenth Cir. 1979); Davis v. Campbell, 608 F.2d 317, 319 (Eighth Cir. 1979); Karlin v. State, 412 F.Supp. 635 (W.D. Okla. 1976). Similarly, except in the most unusual circumstances, the failure of the trial court to give requested jury instructions does not amount to constitutional error, e.g., Eberhardt v. Bordenkircher, 605 F.2d 275, 276 (note) (Sixth Cir. 1979). The Court finds that Petitioner's remaining contentions do not give rise to constitutional questions.

Accordingly, the Court concludes that the Petition should be denied.

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254 be, and the same hereby is, denied.

It is so Ordered this 28<sup>th</sup> day of January, 1980.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 28 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ERVIN MELVIN WALKER, )  
 )  
Petitioner, )  
 )  
vs. ) No. 79-C-656-E  
 )  
NORMAN B. HESS, et al., )  
 )  
Respondents. )

O R D E R

Petitioner, Ervin Melvin Walker, was convicted in the District Court of Tulsa County, State of Oklahoma, in Case No. CRF-76-3128, of the crime of Rape in the First Degree, After Former Conviction of a Felony. The case was tried to a jury, and the petitioner received a sentence of fifty (50) years imprisonment.

A direct appeal was taken to the Oklahoma Court of Criminal Appeals from the aforesaid Judgment and sentence, Case No. F-77-591 whereupon the said Judgment and Sentence was affirmed, Walker v. State, 578 P.2d 1209 (Okla. Crim. 1978). Petitioner thereafter filed an Application for Post-Conviction Relief in the District Court of Tulsa County pursuant to the Oklahoma Post-Conviction Procedures Act, 22 O.S. 1971, §§1080 et seq. The District Court denied said Application on May 1, 1979. Petitioner subsequently appealed the District Court's Order Denying Application for Post-Conviction Relief to the Oklahoma Court of Criminal Appeals, Case No. PC-79-288. The Denial of the District Court was affirmed by the Oklahoma Court of Criminal Appeals on September 18, 1979.

On October 26, 1979, petitioner instituted the present litigation for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The file reveals that the petitioner has exhausted his state court remedies. The petitioner demands his release from custody, claiming that he is being deprived of his liberty in violation of his rights and the constitution of the United States.

The petitioner's complaint can be summarized as follows:

- (a) That it was federal constitutional error for the assistant county attorney during his opening statement to read a portion of information relating to prior offenses CRF-73-2294, CRF-73-2296 and CRF-73-2295.
- (b) That the trial court by accepting a stipulation made by defense counsel without inquiring whether the Defendant concurred in the stipulation, violated the Defendant's rights to due process and equal protection of the law.
- (c) That counsel's failure to raise Sloan v. State, 489 P.2d 774 (Okla. Cr. 1971) and Cox v. Hutto, 589 F.2d 394 (Eighth Cir. 1979) claims at the trial and on direct appeal, constituted a finding that defense counsel was incompetent. These grounds were raised in the appeal from the denial of petitioner's Application of Post-Conviction Relief in Case No. PC-79-288 and rejected by the Court of Criminal Appeals for the State of Oklahoma.

The respondent on November 16, 1979, filed a response, and thereafter the transcript of the State Court proceedings was received. Petitioner filed a Traverse Reply November 29, 1979. The Court has reviewed the entire file, including the State Court proceedings, and the case is now ready for dispositive ruling.

In Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), the Supreme Court laid down the test applicable to a determination of whether the petitioner was entitled to an evidentiary hearing, as follows:

... If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

In reviewing the record, under the test of Townsend, the Court finds that an evidentiary hearing is not necessary.

Petitioner complains of the adequacy of his counsel, alleging counsel stipulated to the reading of portions of information from prior convictions by the prosecutor, in opening statement without making objections thereto. Petitioner alleges that counsel failed to advance Defendant's claims at trial and on appeal.

A habeas petitioner has a strong burden of establishing ineffective assistance of counsel. In Gillihan v. Rodriguez, 551 F.2d 1182, 1187 (Tenth Cir. 1977), cert denied, 434 U.S. 845, 98 S.Ct. 148, 54 L.Ed.2d 111, the Court stated:

"The burden on appellant to establish his claim of ineffective assistance of counsel is heavy. Neither hindsight nor success is the measure for determining adequacy of legal representation."

See also Fritz v. Douglas, 446 F.Supp. 841 (W.D. Okla. 1977); Tapia v. Rodriguez, 446 F.2d 410 (Tenth Cir. 1971), quoting from Ellis v. Oklahoma, 430 F.2d 1352 (Tenth Cir. 1970), cert denied, 401 U.S. 1010, 91 S.Ct. 1260, 28 L.Ed.2d 546 (1971). See also Witham v. Mabry, 596 F.2d 293 (Eighth Cir. 1979), Johnson v. U.S., 506 F.2d 640 (Eighth Cir. 1974).

In the past, the general rule has been that relief upon a final conviction on the ground of ineffective counsel would be granted only if the trial was a mockery of justice, a farce or was shocking to the conscience. The petitioner could not prevail unless counsel's representation was in bad faith, a sham, a pretense or without adequate opportunity for conference and preparation. Fritz v. Douglas, supra; Gillihan v. Rodriguez, supra; Young v. State of Oklahoma, 428 F.Supp. 288 (W.D. Okla. 1976).

The courts have held the constitutional right to effective counsel was violated only when the services of the attorney were at such a sub-standard level that the trial was a mockery.

Frand v. U.S., 301 F.2d 102 (Tenth Cir. 1962).

Some courts have held that the representation of a defendant must be so transparently inadequate to make a total farce of a trial in order to meet the standards for relief of ineffective assistance of counsel, which is granted only in extreme instances. Williams v. Leeke, 444 F.Supp. 229 (D.S. Car. 1976); Root v. Cunningham, 344 F.2d 1 (Fourth Cir. 1965) cert. denied, 382 U.S. 866, 86 S.Ct. 135, 15 L.Ed.2d 104 (1965).

However, the Tenth Circuit recently replaced the "sham and mockery" test with a stricter test to determine whether counsel has been ineffective. In Cephus Donald Dyer v. Richard Crisp, \_\_\_\_\_ F.2d \_\_\_\_\_, (Tenth Cir. Jan. 11, 1980), the court held the following:

"the Sixth Amendment guarantee to effective assistance of counsel dictates that one accused of crime be afforded reasonably competent assistance of counsel." (see slip opinion no. 78-1772 at p. 2).

The court in Cephus clearly stated the test of effective assistance of counsel in the Tenth Circuit to be:

"The Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney." (see slip opinion no. 78-1772 at p. 8).

Tested against the new Tenth Circuit standard of reasonably competent or skillful assistance of counsel, Walker's claim that his constitutional right to counsel had been violated fails nevertheless.

A defendant in a criminal prosecution is not entitled to a perfect trial. In the absence of a clear indication that counsel was inadequate, there is no violation of constitutional rights. Edwards v. State, 476 P.2d 378 (Cr.App. Okla. 1970). Where counsel otherwise performs his duties in a wholly competent manner, a choice of trial tactics, even though they may seem unwise in retrospect, can rarely be said to rise to the level of deprivation of constitutional rights. U.S. v. Grummel, 542 F.2d 789 (Ninth Cir. 1976); Mengarelli v. U.S. Marshall, 476 F.2d 617 (Ninth Cir. 1973).

A reading of the trial transcript reveals that petitioner was not denied effective assistance of counsel. At page 7 of the trial transcript, petitioner's counsel informed petitioner that if he testified in his behalf that his prior record would be exposed and petitioner agreed thereto.

It is the duty of counsel in making opening statements to state the facts fairly. A mere violation of this rule by a prosecuting attorney does not constitute reversible error. Bias v. State, 561 P.2d 523 (Okla. Cr. 1977) quoting from Harvell v. State, 395 P.2d 331 (Okla. Cr. 1964). Usually a defendant's character is not put in issue until he takes the stand. In the case at hand, the petitioner intended to take the stand, the prosecutor read the contested information during opening statement, then defendant did indeed testify in his own behalf. The defendant's counsel made certain tactical decisions apparently in the utmost good faith which did not deprive defendant of his constitutional rights.

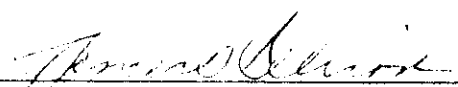
In U.S. ex rel. Bibbs v. Twomey, 538 F.2d 151 (Seventh Cir. 1976) the court held that by failing to object to the prosecution's introduction of evidence of the defendant's prior convictions, the defendant's counsel made a deliberate, tactical decision to waive objections to such use of prior convictions.

The appeal taken was sufficient to afford the defendant an effective opportunity to raise issues. Defendant was not denied effective assistance of counsel in the appeal process.

The Court, upon consideration of the grounds raised by the petitioner, finds such grounds do not support a finding of ineffective assistance of counsel. The Court, therefore, finds that petitioner was not denied effective assistance of counsel in his state court trial or appeal.

IT IS THEREFORE, ORDERED that the Petition for Writ of Habeas Corpus, pursuant to 28 USCA §2254, be and the same is hereby denied.

ENTERED this 28<sup>th</sup> day of January, 1980.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

FILED

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Petitioner,

VS.

Respondents.

No. 79-C-705-E

The Court has before it for consideration Petitioner's Petition for Writ of Habeas Corpus. Petitioner is presently incarcerated at the Oklahoma State Penitentiary by virtue of a Judgment rendered December 16, 1977, in the District Court of Tulsa County, State of Oklahoma. Petitioner received a thirty-five (35) year sentence upon conviction of the crime of Robbery With a Firearm, After Former Conviction of a Felony, Case No. CRF-77-1305. A direct appeal was taken to the Oklahoma Court of Criminal Appeals from the aforesaid Judgment and Sentence, Case No. F-78-323, whereupon said Judgment was affirmed.

It appears from a careful consideration of the file, including Petitioner's amended brief that Petitioner has not exhausted his state court remedies. See Karlin v. State of Okla., 412 F.Supp. 635 (W.D. Okla. 1976); Brown v. Crouse, 395 F.2d 755 (Tenth Cir. 1968); Omo v. Crouse, 395 F.2d 757 (Tenth Cir. 1968).

Therefore, since Petitioner has not exhausted his state court remedies, the Petition for Writ of Habeas Corpus is hereby dismissed.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Habeas Corpus be and the same is hereby dismissed.

ENTERED this 28<sup>th</sup> day of January, 1980.

*James O. Ellison*  
JAMES O. ELLISON  
JUDGE OF THE DISTRICT COURT





and then out of the building. Additionally, Plaintiff alleges that he requested his final check at this time and was denied it, contrary to company policy.

Plaintiff alleges that as a result of these events, he was severely physically injured by the shock of his sudden termination, and suffered tremendous emotional distress.

Plaintiff, in his second cause of action, realleges the foregoing facts, and alleges that as a result thereof, he was denied his right to due process. He specifically alleges that he was not given adequate notice of the company's grievances against him, as required by company policy, and that he was denied a fair and impartial hearing in the matter, in contravention of his rights under the 5th and 14th amendments.

Plaintiff's third cause of action is specifically against Defendant Vaughn, and alleges that Vaughn was guilty of making a false representation to Plaintiff concerning Plaintiff's anticipated merit increase. Specifically, Plaintiff alleges that Defendant Vaughn told Plaintiff that Plaintiff's merit increase had gone through when in fact it had not. Plaintiff seeks damages equal to the amount he would have received had his merit increase actually gone through.

It is well settled that the complaint, when challenged by a motion to dismiss, is to be construed in the light most favorable to the Plaintiff, taking as true all well-pleaded allegations. Cruz v. Beto, 405 U.S. 319 (1972); Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319 (Tenth Cir. 1977); Mitchell v. King, 537 F.2d 385 (Tenth Cir. 1976); Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1103 (Tenth Cir. 1973); Williams v. Eaton, 443 F.2d 422 (Tenth Cir. 1971); Olpin v. Ideal Nat'l Ins. Co., 419 F.2d 1250 (Tenth Cir. 1969), cert. denied, 397 U.S. 1074 (1970); Ryan v. Scoggin, 245 F.2d 54 (Tenth Cir. 1957); In re Home-Stake Production Co. Securities Litigation, 76 F.R.D. 337 (N.D.Okla. 1975); Niece v. Sears, Roebuck & Co., 293 F.Supp. 792 (N.D.Okla. 1968); Lee v. Derryberry, 466 F.Supp. 30 (W.D.Okla. 1978). See also 5 Wright & Miller §1357.

The test to be applied in determining the sufficiency of the complaint is that

a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Accord: Cruz v. Beto, supra, Jenkins v. McKeithen, 395 U.S. 411 (1969); Bell v. Hood, 327 U.S. 678 (1946); Bryan v. Stillwater Bd. of Realtors, supra; American Home Assur. Co. v. Cessna Aircraft Co., 551 F.2d 804 (Tenth Cir. 1977); Dewell v. Lawson, 489 F.2d 877 (Tenth Cir. 1974); Gas-A-Car, Inc. v. American Petrofina, Inc., supra; Jackson v. Alexander, 465 F.2d 1389 (Tenth Cir. 1972); Franklin v. Meredith, 386 F.2d 958 (Tenth Cir. 1967); Coyle v. Hughs, 436 F.Supp. 591 (W.D.Okla. 1977); Hartford Acc. & Indemn. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 74 F.R.D. 357 (W.D.Okla. 1976); Hatridge v. Seaboard Surety, 74 F.R.D. 6 (E.D.Okla. 1976); Starke v. Secretary, U.S. Dept. of Housing and Urban Development, 454 F.Supp. 477 (W.D.Okla. 1976); Town of Freedom, Okla. v. Muskogee Bridge Co., 466 F.Supp. 75 (W.D.Okla. 1978).

If sufficient facts are alleged to entitle the Plaintiff to recovery on any legal theory, the complaint is not vulnerable to a dismissal under Rule 12(b)(6), even though the pleader has suggested or intended a different theory. See generally 2A Moore's Federal Practice ¶8.14; 5 Wright & Miller §1216. Indeed, it is not even required under federal practice that any particular theory of recovery be alleged, e.g., Southern Colorado Presstress Co. v. Occupational Safety and Health Review Comm'n, 586 F.2d 1342, 1346 n.6 (Tenth Cir. 1978); Misco Leasing, Inc. v. Keller, 490 F.2d 545 (Tenth Cir. 1974), because it is the Court's "duty to grant the relief to which the prevailing party is entitled, whether demanded or not." Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, 976 (Second Cir. 1945). See also Rohler v. TRW, Inc., 576 F.2d 1260 (Seventh Cir. 1978); Eye Encounter, Inc. v. Contour Art, Ltd., 81 F.R.D. 683, 689 (E.D.N.Y. 1979);

La Raza Unida v. Volpe, 440 F.Supp. 904, 912 n.20 (N.D.Cal. 1977). In Rohler v. TRW, Inc., supra, the court said:

While it may impose a heavy burden on the trial court to require it to search a complaint for any claim which may be stated therein, it is a burden which must be undertaken. We believe that the district court has the duty under Rule 8(a) of the Federal Rules of Civil Procedure to read a complaint liberally and to determine whether the facts set forth ... state a claim for relief on a basis other than the ... basis pleaded.

576 F.2d at 1264. Though the Complaint herein sets forth the theory that Plaintiff has been deprived of certain constitutional rights, and, as Defendants rightly argue, this theory must in these circumstances fail under the authority of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Court cannot say, upon the present posture of this case, that Plaintiff can prove no facts which would entitle him to relief on any theory.

Defendants also argue that Plaintiff, insofar as his Complaint alleges intentional infliction of emotional distress, has failed to properly allege that Defendants' activities were so outrageous and extreme as to be intolerable. Under federal practice, Rule 8(a), Fed.R.Civ.P., merely requires that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." It is the Court's opinion that the Complaint is sufficient under the liberal standards of notice pleading. Conley v. Gibson, supra. The language of the court in Thompson v. Allstate Ins. Co., 476 F.2d 746 (Fifth Cir. 1973) is enlightening:

A complaint is sufficient if it satisfies the Federal Rules, even though it would be subject to demurrer in a state court for failure to set forth facts sufficient to constitute a cause of action. (citations omitted)

Ancestor.worship in the form of ritualistic pleadings has no more disciples. The time when the slip of a sergeant's quill pen could spell death for a plaintiff's cause of action is past. Under Federal Rules of Civil Procedure, a complaint is not an anagrammatic exercise in which the pleader must find just exactly the prescribed combination of words and phrases.

476 F.2d at 749. Whether Plaintiff can prove his claim is

an entirely separate question from whether he has sufficiently stated it.

The foregoing authorities are equally applicable to Plaintiff's "Third Cause of Action," based upon fraud.

The motion of Defendant Cates, however, rests upon other grounds. While the standards to be applied are undeniably very liberal, it has been pointed out that "more detail often is required than the bald statement by plaintiff that he has a valid claim of some type against defendant." 5 Wright & Miller §1357, at 596. The Complaint herein names Marvis Cates as a party defendant, and, under Plaintiff's "First Cause of Action" it is alleged that Marvis Cates was at all pertinent times a resident of Jackson County, Missouri, and was one of Plaintiff's immediate supervisors, along with Defendants Vaughn and Wasem. Defendant Cates is also named as a defendant in Plaintiff's prayer for judgment. Nowhere, however, is it alleged that Cates, through either commission or omission, caused any harm to Plaintiff. Plaintiff appears to conclude that because Cates was his supervisor, liability exists. The Court in Bryan v. Stillwater Board of Realtors, 578 F.2d 1319 (Tenth Cir. 1977) stated:

On a motion to dismiss, facts well pleaded are taken as correct, but allegations of conclusions or of opinions are not sufficient when no facts are alleged by way of the statement of the claim. Fed Rules Civ. Proc., rule 8(a)(2), 28 U.S.C.A.; Coopersmith v. Supreme Court of Colorado et al., 465 F.2d 993 (10th Cir. 1972); Olpin v. Ideal National Insurance Company, 419 F.2d 1250 (10th Cir. 1969), cert. denied, 397 U.S. 1074, 90 S.Ct. 1522, 25 L.Ed.2d 809 (1970).

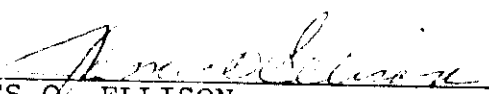
578 F.2d at 1321. See also Kadar Corp. v. Milbury, 549 F.2d 230 (First Cir. 1977); International Harvester Co. v. Kansas City, 308 F.2d 35 (Tenth Cir. 1962), cert. denied, 371 U.S. 948 (1962); Smith v. Sinclair, 424 F.Supp. 1108 (W.D.Okla. 1976).

Even though the Court, mindful of the applicable authorities, has viewed the Complaint in the most favorable light, it cannot conclude that Plaintiff has stated a claim against Defendant Cates.

IT IS THEREFORE ORDERED that the Motions to Dismiss of Defendants Southwestern Bell Telephone Company, Dean Wasem, Dave Vaughn, Jim Dennanny and Robert Hatter be, and the same hereby are, overruled.

IT IS FURTHER ORDERED that the Motion to Dismiss of Defendant Marvis Cates be, and the same hereby is, sustained, and the Complaint is hereby dismissed as to Defendant Marvis Cates.

It is so Ordered this 28<sup>th</sup> day of January, 1980.

  
\_\_\_\_\_  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAYLESS CASHWAYS, INC.,  
a Corporation,

Plaintiff,

v.

BILL BALLEW, d/b/a ACME  
FENCE & IRON COMPANY,

Defendant.

No. 79-C-718-E

JAN 25 1980


Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT

The Defendant Bill Ballew, d/b/a Acme Fence & Iron Company, having failed to plead or otherwise defend in this action and his default having been entered,

NOW, upon application of the Plaintiff and upon affidavit that the Defendant is indebted to Plaintiff in the sum of \$22,377.01, that Defendant has been defaulted for failure to appear and that Defendant is not an infant or incompetent person, and is not in the military service of the United States, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff recover of Defendant the sum of \$22,377.01 with interest at the rate of 12% per annum from the 25<sup>th</sup> day of January, 1980, including costs in the sum of \$63.96.

  
Jack C. Silver, Clerk of the  
United States District Court for  
the Northern District of Oklahoma

Dated: January 25<sup>th</sup>, 1980.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CHARLES ELMO YANDELL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 79-CR-121-C
	)	No. 80-C-6-C
United States of America,	)	
	)	
Respondent.	)	

**F I L E D**

**JAN 25 1980**

O R D E R

Jack C. Silver, Clerk  
**U. S. DISTRICT COURT**

Petitioner herein moves this Court pursuant to the provisions of Title 28 U.S.C. § 2255 to vacate the sentence imposed by it upon him on October 16, 1979.

The petitioner was charged by information in Case No. 79-CR-121 with violations of Title 18 U.S.C. §§922(m) and 922(b)(5), in that he failed to make and properly maintain certain records required to be made and kept by a licensed firearms dealer. Petitioner entered a plea of guilty to those charges on September 14, 1979.

The petitioner raises three grounds in support of his motion. He first contends that the Court relied upon inaccurate or incomplete information in determining his sentence. Secondly, he contends that the Court failed to comply with Rule 32(c)(3)(B) of the Federal Rules of Criminal Procedure. Finally, petitioner claims that he was denied effective assistance of counsel by reason of the failure of his attorney to perfect an appeal.

The first two grounds raised by the petitioner involve a confidential report to the Court from the United States Probation Office concerning a conversation between the petitioner and an undercover law enforcement officer about the sale of certain stolen goods. Petitioner claims that the Court was acting upon incomplete information in determining his sentence in that the Court was not aware that



petitioner was merely feigning cooperation and interest in the illegal venture at the behest of the United States Attorney and the Bureau of Alcohol, Tobacco, and Firearms.

The Court would first state that it was aware of petitioner's cooperation with law enforcement officers. The Court would further state that in determining petitioner's sentence, it did not rely in any respect upon the confidential report. The trial judge may rely on his own personal recollections in assessing the sufficiency of a Section 2255 motion. See Blackledge v. Allison, 431 U.S. 63, 74 n.4, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977); Farrow v. United States, 580 F.2d 1339, 1352 (9th Cir. 1978). Based upon its own recollections, this Court finds that the first ground raised by petitioner is without merit.

With respect to petitioner's second ground, the Court, by the very terms of Rule 32(c)(3), was not required to comply with Subsection (B) thereof. Rule 32(c)(3)(B) provides as follows:

If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera. (Emphasis added).

The petitioner contends that the confidential report just referred to was undisclosed information contained in the presentence report and that the Court was therefore under an obligation to provide the petitioner with a summary of the facts contained therein.

First, the confidential report was not a part of the presentence report. It was separately submitted to the Court by the probation department after the presentence report was submitted. Furthermore, as the Court has

previously noted, the information contained in the confidential report was not relied upon in determining petitioner's sentence. Finally, assuming that the confidential report was a part of the presentence report, Rule 32(c)(3)(A) only requires the Court to permit a defendant or his counsel to see the presentence report upon a request to do so. In this case, there was no request to see the presentence report. The petitioner and his counsel were voluntarily allowed to see the report. Absent such a request, the Court was under no obligation to reveal any part of the presentence report to the petitioner. The petitioner cannot claim that he could not make such a request because he did not know of the existence of the confidential report. In his Motion he admits that the probation officer informed him of its existence just prior to sentencing.

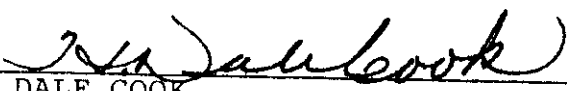
Under his third ground, the petitioner contends that his counsel failed to file an appeal raising the purported errors discussed above when he had said that he would do so and that petitioner was therefore denied effective assistance of counsel. In this instance, petitioner's attorney's failure to appeal would not entitle petitioner to relief.

When an accused is represented throughout a trial and in subsequent proceedings by retained counsel the failure to perfect an appeal within the statutory time is not grounds for discharge on habeas corpus. McKee v. Page, 435 F.2d 689, 691 (10th Cir. 1970). See also Marsh v. United States, 435 F.Supp. 426 (W.D. Okla. 1976).

Petitioner was represented by retained counsel throughout the criminal proceedings against him. He was represented by retained counsel after those proceedings were concluded and he is presently represented by retained counsel.

For the foregoing reasons, it is therefore ordered that petitioner's motion to vacate sentence is hereby denied.

It is so Ordered this 24<sup>th</sup> day of January, 1980.

  
H. DALE COOK  
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ERNEST E. CLULOW, JR.,                     )  
  )  
                          Plaintiff,             )  
  )  
vs.   )     No. 78-C-387-C  
  )  
STATE OF OKLAHOMA, et al.,             )  
  )  
                          Defendants.            )

**FILED**

**JAN 25 1980**

**Jack C. Silver, Clerk  
U. S. DISTRICT COURT**

O R D E R

Plaintiff brings the above-captioned case pursuant to Title 42 U.S.C. §§ 1983 and 1985 and the Declaratory Judgment Act, 28 U.S.C. §2201. The plaintiff alleges that the defendants have deprived him of his constitutional rights to due process and equal protection while acting under color of state law. Now before the Court are motions to dismiss the Amended Complaint by the defendants Dave Faulkner, Finis Smith, Kenneth Spear, State of Oklahoma, Larry Derryberry, and Dr. Joe E. Tyler, and the alternative motion to dismiss or for summary judgment by the defendants Oklahoma Bar Association, Stuart B. Strasner, Bill Boswell, William H. Bell, John M. Luttrell, Deryl Lee Gotcher, and Paul M. Vassar (Bar Association defendants).

Plaintiff's claims against the defendants arise out of his involuntary commitment for treatment of mental illness on several different occasions and his suspension from the practice of law in Oklahoma because of mental incapacity. The plaintiff generally challenges the procedures followed by the defendants in accomplishing these results.

All of the defendants contend that the statute of limitations has run on plaintiff's claims. Count One of the amended Complaint is based upon events allegedly occurring in 1960. Count Two is based upon events allegedly occurring in 1961. Count Three is based upon events allegedly occurring

in 1966. Count Four alleges events occurring in 1972, and Count Five alleges events occurring in 1962, the mid-1960's and the 1970's up to 1978. Count Six is purportedly a conspiracy claim, the acts alleged in the other five counts being the overt acts. Plaintiff's Complaint was filed on August 17, 1978.

Because plaintiff's claims sound in tort, the two-year statute of limitations found at Title 12 O.S. §95 (Third) would be applicable. See Wright v. St. John's Hospital, 414 F.Supp. 1202 (N.D.Okla. 1976). See also Brogan v. Wiggins School Dist., 588 F.2d 409 (10th Cir. 1978); Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1978). It is clear that the statute has run on the first four counts of the Amended Complaint. Plaintiff, however, contends that grounds exist for the tolling of the statute in this instance.

He first contends that the statute should be tolled because the defendants wrongfully refused to provide him with certain records pertinent to his claims herein until 1977. There are no allegations of such a wrongful refusal in the Amended Complaint. Furthermore, it is not the refusal to provide or the wrongful concealing of pertinent facts alone that toll the running of the statute of limitations. When such acts prevent the plaintiff from knowing or discovering the existence of a claim, the statute will be tolled. See, e.g. Sanders v. United States, 551 F.2d 458 (D.C.Cir. 1977); Portis v. United States, 483 F.2d 670 (4th Cir. 1973); American Tobacco Co. v. People's Tobacco Co., Ltd., 204 F.58 (5th Cir. 1913). Plaintiff does not contend that he did not know he had a claim or claims against the defendants until they provided him with the records.

The plaintiff next contends that the statute of limitations should be tolled because he has alleged a continuing tort. It is apparent that the first four counts of the Amended Complaint allege isolated events, the most recent of

which was concluded approximately six years before the plaintiff filed his Complaint. Counts Five and Six do, however, conceivably involve "continuing" torts.

Count Five involves the Bar Association defendants. Plaintiff alleges that he was suspended from the practice of law in 1962. He further alleges that he petitioned for reconsideration of his case first in the mid-1960's, and again several times in the 1970's, with the last time being in 1978, but that his suspension has never been lifted. Because plaintiff's claims under Count Five relate to both his initial suspension and the reinstatement procedures, it does not clearly appear on the face of Count Five that those claims are barred by the statute of limitations. In order to dismiss for failure to state a claim on the ground that the statute of limitations has run, the running of the statute must clearly appear on the face of the complaint. See, e.g. Ott v. Midland-Ross Corp., 523 F.2d 1367 (6th Cir. 1975); Searight v. State, 412 F.Supp. 413 (D.N.J. 1976).

However, there is authority that the federal courts may not in any event consider claims of the type alleged in Count Five under the Civil Rights Acts. In Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962), an action brought under Title 42 U.S.C. §1983, the court held that the federal courts did not have jurisdiction to review an order of a state court disbarring an attorney, but that the only method by which review could be had was by a writ of certiorari to the United States Supreme Court. The court emphasized the autonomous control that state courts and federal courts have over the conduct of their officers, and that disbarment in a state court did not necessarily command disbarment in the federal court. In Mayes v. Honn, 542 F.2d 822 (10th Cir. 1976), the court did not base its holding on jurisdictional grounds but concluded that a challenge to the judgment in and conduct of state disbarment proceedings was a misuse of Section 1983, as it was simply an effort to get an appeal in

federal court under the guise of a civil rights action. Most recently in Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), the court concurred with the finding of the district court that it did not have subject matter jurisdiction to review a final order of the state Supreme Court denying a particular application for admission to the state bar, even though the plaintiff had alleged deprivations of his rights to due process and equal protection under Section 1983.

Plaintiff's Count Five may likewise be characterized as an attempt to appeal from particular state bar proceedings. The Bar Association defendants have submitted documentation of the consideration given plaintiff's suspension. The plaintiff has twice been before the Oklahoma Supreme Court. Count Five is obviously an attempt to gain further review of plaintiff's suspension under the guise of a civil rights action. The Court therefore lacks subject matter jurisdiction over that Count.

The statute of limitations on Count Six, the conspiracy count, begins to run on the date of the last overt act. See Brogan v. Wiggins School Dist., supra; Crosswhite v. Brown, 424 F.2d 495 (10th Cir. 1970). Because the plaintiff incorporates the acts of the other five counts as the overt acts, and the latest of these would be the events purportedly occurring in 1978 as alleged in Count Five, it does not appear from the face of Count Six that the statute of limitations has run. However, the plaintiff's claim of a conspiracy is defective in other respects.

A conspiracy claim cannot survive a motion to dismiss if it contains conclusory allegations of conspiracy which are not supported by reference to material facts. See Slotnik v. Staviskey, 560 F.2d 31 (1st Cir. 1977). A civil conspiracy is

"a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object; or a lawful object by un-

lawful or oppressive means." ... "The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury." (Citations omitted) Neff v. World Publishing Co., 349 F.2d 235, 257 (8th Cir. 1965). See also Ammlung v. City of Chester, 494 F.2d 811 (3rd Cir. (1974)); Dill v. Rader, 533 P.2d 650 (Okla.Ct.App. 1975).

Plaintiff has made only conclusory allegations of the existence of a conspiracy. He has alleged acts of each of the alleged conspirators in derogation of his constitutional rights, but there is nothing alleged that connects these acts together as one concerted or joint activity.

For the foregoing reasons it is therefore ordered that the motions to dismiss here under consideration are hereby sustained. The alternative motion for summary judgment of the Bar Association defendants is therefore overruled as it is now moot.

It is so Ordered this 24<sup>th</sup> day of January, 1980.

  
H. DALE COOK  
Chief Judge, U. S. District Court

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

GARY K. RICE,

Plaintiff,

vs.

CARRIER CORPORATION, Successor  
to DAY AND NIGHT COMPANY, a  
foreign corporation; and ESSEX  
INTERNATIONAL, INC., a foreign  
corporation,

Defendants.

No. 77-C-233-B

**FILED**

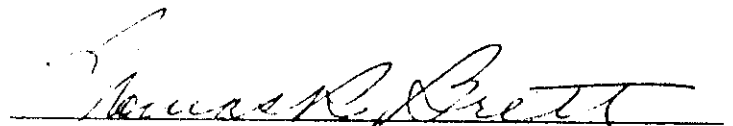
**JAN 25 1980**

Jack C. Silver, Clerk  
**U. S. DISTRICT COURT**

J U D G M E N T

On Monday, January 21, 1980, the captioned case was called for trial and all parties through their respective counsel of record announced ready to proceed with the jury trial. After selection of a jury on Monday, January 21, 1980, and the presentation of evidence on January 22, 23 and 24, 1980, on behalf of the plaintiff and the defendants, and all parties having rested on January 24, 1980, the defendant, Essex International, Inc., renewed its motion to dismiss and moved for a directed verdict. The Court, after considering the pre-trial conference order and all evidence of record, concluded the defendant, Essex International, Inc.'s motion for directed verdict was well taken and should be granted.

IT IS, THEREFORE, ORDERED on this 24th day of January, 1980, the motion for directed verdict of the defendant, Essex International, Inc., is hereby sustained, the defendant, Essex International, Inc., is granted judgment against the plaintiff herein, and the plaintiff is granted an exception to the Court's order and judgment.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

1 - 25 - 80



**United States District Court**

FOR THE

NORTHERN DISTRICT OF OKLAHOMAGary K. Rice, et al.,  
Plaintiffs,

vs.

Carrier Corporation,  
Defendant.

CIVIL ACTION FILE NO. 77-C-233-BT ✓

JUDGMENT

This action came on for trial before the Court and a jury, Honorable THOMAS R. BRETT  
, United States District Judge, presiding, and the issues having been duly tried and  
the jury having duly rendered its verdict, for the Defendant Carrier Corporation,

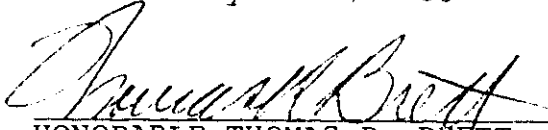
It is Ordered and Adjudged that the Plaintiffs take nothing and that  
the Defendant Carrier Corporation recover of the Plaintiffs its  
costs of action.

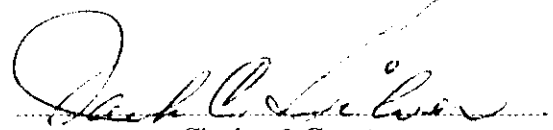
**FILED**

JAN 25 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 25th day  
of January, 19 80.

  
HONORABLE THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

  
Clerk of Court  
JACK C. SILVER

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOROTHY RUTH RIDDLE,

Plaintiff,

vs.

GETTY REFINING AND  
MARKETING COMPANY,

Defendant.

No. 78-C-350-BT

FILED

JAN 25 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

This cause having come before me on the Application by Plaintiff for dismissal of her action with prejudice, for the reason that this matter has been privately resolved between the parties, and the Court being fully advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED that the cause of action and complaint of the Plaintiff herein be, and hereby is, dismissed with prejudice, with each party to bear its own costs.

So Ordered this 25 day of Jan., 1980.

*Thomas R. Brett*  
U. S. District Court Judge

APPROVED:

*Edward L. Moore, Jr.*  
Edward L. Moore, Jr.  
Attorney for Plaintiff

*Lonnie D. Eck*  
Lonnie D. Eck  
Attorney for Plaintiff

*Mary S. Matthews*  
Mary S. Matthews  
Attorney for Defendant

FILED

JAN 25 1980

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

REGINA GAIL REEDER, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
WALTER WAYNE MCGUIRE, J & G SWARTZ, )  
INC., and BANKER'S AND SHIPPER'S )  
INSURANCE COMPANY OF NEW YORK, )  
 )  
Defendants. )

No. 79-C-414-DE

ORDER OF DISMISSAL

ON this 25<sup>th</sup> of January upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the Plaintiff filed herein against the Defendants be and the same hereby is dismissed with prejudice to any future action.

S/ JAMES O. ELLISON

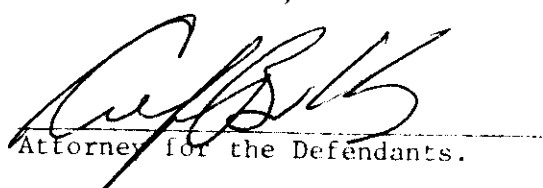
JUDGE, DISTRICT COURT OF THE UNITED  
STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

J. DOUGLAS MANN

  
Attorney for the Plaintiff,

ALFRED B. KNIGHT,

  
Attorney for the Defendants.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DAVID HOYT,

Plaintiff,

vs.

EUROPEAN BAKERS, LTD.,  
a Georgia Corporation,

and

BRUCE HUBBARD,

Defendants.

No. 80-C-9-E

**FILED**

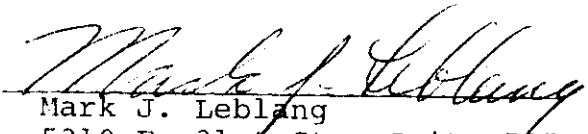
JAN 24 1980

NOTICE OF ~~99~~ DISMISSAL

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

COMES NOW Mark J. Leblang, counsel for the Plaintiff above named, and respectfully shows to the Court that all matters, controversies and liabilities owed by the Defendant to the Plaintiff herein have been paid, settled and compromised; and that there are no remaining issues to be tried or determined by the Court.

WHEREFORE, Plaintiff voluntarily dismisses and above styled and numbered action with prejudice to the bringing of another or future action pursuant to the provisions of Fed. Rules Civ. Proc., Rule 41(a)(1).

  
Mark J. Leblang  
5310 E. 31st St., Suite 505  
Tulsa, Okla. 74135  
(918) 664-8390

Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 24<sup>th</sup> day of January,  
1980, a true and correct copy of the above and foregoing Notice  
For Dismissal was mailed to the following person with proper  
postage thereon fully prepaid:

Mr. Paul C. Wilgus  
Bryan, Wilgus & Spell  
Suite 1600, 400 Colony Square  
Atlanta, Georgia 30361

Mr. Bruce Hubbard  
P O. Box 7107  
Monroe, La. 71201

Mark J. Leblang  
Mark J. Leblang

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA for the  
use and benefit of ROBERT W. HORRALL  
d/b/a HORRALL CONSTRUCTION COMPANY,

Plaintiff,

-vs-

UTILITY CONTRACTORS, INC., a corporation;  
MID-STATES CONSTRUCTION OF DERBY, INC.,  
a corporation; and FEDERAL INSURANCE  
COMPANY, a corporation,

Defendants.

FILED

JAN 24 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 79-C-180-E

ORDER OF DISMISSAL WITH PREJUDICE

On this 24<sup>th</sup> day of January, 1979, the  
Court has for consideration the Stipulation for Dismissal with  
Prejudice entered into between Robert W. Horrall, the plaintiff,  
and Utility Contractors, Inc., a nd Federal Insurance Company,  
defendants, and the Court, having reviewed the file and stipula-  
tion for dismissal, finds that the above styled action should be  
dismissed and that such dismissal should be with prejudice.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE  
COURT that the above styled and numbered action be and same  
is hereby dismissed with prejudice.

APPROVED:

Frank E. Turner  
Frank E. Turner, Attorney for Plaintiff

15/Jay C. Baker  
Jay C. Baker, Attorney for Federal Ins-  
urance Company and Utility Contractors,  
Inc., defendants

FILED

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAN 23 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

United States of America,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO. 78-C-631-E
	)	
vs.	)	This action applies to the
	)	Surface Interest and all
1.30 Acres of Land, More or	)	Mineral Interests of the
Less, Situate in Washington	)	Surface Owners in the estate
County, State of Oklahoma, and	)	taken in:
Ray Andrew Elkhair, Sr., et al.,	)	
and Unknown Owners,	)	Tract No. 335E-2
	)	
	)	(Included in D.T. filed in
Defendants.	)	Master File #400-15)

J U D G M E N T

1.  
NOW, on this 23<sup>rd</sup> day of January 1980, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on a stipulation of the parties agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for the Plaintiff, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 335E-2, as such estate and tract are described in the Complaint filed in this action.

3.

The Court has jurisdiction of the parties and subject matter of this action.

4.

Service of Process has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause.

5.

The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power, and authority to condemn for public use the property described in said Complaint. Pursuant thereto, on December 29, 1978, the

United States of America filed its Declaration of Taking of such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing said Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of the Court as estimated compensation for the taking of a certain estate in subject tract a certain sum of money and none of this deposit has been disbursed, as set out below in paragraph 11.

7.

The defendants named in paragraph 11 as owners of the subject property are the only defendants asserting any interest in such property. All other defendants having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject tract and the United States of America have executed and filed herein on December 13, 1979, a certain Stipulation As to Just Compensation, wherein they have agreed that just compensation for the estate condemned in subject tract is in the amount shown as compensation in paragraph 11 below, and such Stipulation should be approved.

9.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power, and authority to condemn for public use Tract No. 335E-2, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of the estate described in such Complaint, is condemned, and title thereto is vested in the United States of America, as of December 29, 1978, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such estate.



10.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of the estate condemned herein in subject tract were the defendants whose names appear below in paragraph 11, and the right to receive the just compensation for the estate taken herein in such tract is vested in the parties so named.

11.

It is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation mentioned in paragraph 8 above hereby is confirmed; and the sum thereby fixed is adopted as the award of just compensation for the estate condemned in subject tract, and such award is allocated among the owners as follows:

TRACT NO. 335E-2

OWNERS:

Marjorie Elkhair ----- 1/9  
(Surviving wife of Ray Andrew  
Elkhair, Sr., deceased)  
Ray Andrew Elkhair, Jr. ----- 4/9  
Cynthia Loraine Elkhair Houle ----- 4/9

Award of just compensation  
pursuant to Stipulation ----- \$400.00      \$400.00

Deposited as estimated compensation ----- \$400.00

Allocation of Award:

To Marjorie Elkhair ----- \$ 44.44  
To Ray Andrew Elkhair, Jr. ----- \$177.78  
To Cynthia Loraine Elkhair Houle ----- \$177.78

Total ----- \$400.00

Disbursed to Owners ----- None

Balance due to Owners ----- \$400.00

12.

It Is Further ORDERED that the Clerk of this Court shall disburse the deposit in this case as follows:

To Marjorie Elkhair ----- \$ 44.44


To Ray Andrew Elkhair, Jr. ----- \$177.78


To Cynthia Loraine Elkhair Houle ---- \$177.78

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
HUBERT A. MARLOW  
Assistant U. S. Attorney

  
J. DOUGLAS LANE  
Attorney for Marjorie Elkhair

  
SUZETTE CHAFIN  
Attorney for Ray Andrew Elkhair, Jr.  
and Cynthia Loraine Elkhair Houle

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

KIN-ARK CORPORATION,  
A Delaware corporation,  
  
Plaintiff,

-vs-

W. M. (PAT) BOYLES, WALTER  
M. BOYLES, LARRY L. BOYLES  
and SANDRA J. BOYLES,

Defendants.

**FILED**  
JAN 23 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 74-C-389-C ✓

AMENDED JUDGMENT

Judgment was entered by the Court herein, including certain Findings of Fact and Conclusions of Law, on December 30, 1976. Subsequently, on March 1, 1979, the United States Court of Appeals, Tenth Circuit, reversed the Court's judgment insofar as it allowed Kin-Ark unpaid interest on its First Cause of Action and denied the defendant, W. M. (Pat) Boyles, usury penalties and attorneys fees. The portions of the original judgment and Findings of Fact and Conclusions of Law granting judgment with respect to the plaintiff's First Cause of Action are therefore amended to read as follows:

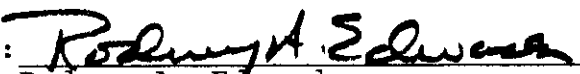
"IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Judgment be entered for the plaintiff, Kin-Ark Corporation and against the defendant, W. M. (Pat) Boyles, for interest on loans to him prior to November 14, 1972 in the amount of \$9,815.00 and for interest thereon at the rate of 8-1/2% per annum from November 14, 1972 to date of judgment in the sum of \$3,172.00 and that judgment be entered for the defendant, W. M. (Pat) Boyles, and against the plaintiff on plaintiff's claim for additional interest of \$13,631.70, be and the same is hereby forfeited pursuant to Texas law and that the defendant, W. M. (Pat) Boyles, be granted a statutory penalty against the plaintiff in the sum of \$40,709.90 the same being twice the amount of interest charged, collected or received on the note dated November 14, 1972.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the award of statutory penalty in favor of the defendant, W. M. (Pat) Boyles, shall be set-off as against the total judgment due and owing the plaintiff, Kin-Ark Corporation, by the defendant, W. M. (Pat) Boyles.

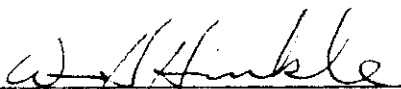
  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

JONES, GIVENS, GOTCHER,  
DOYLE & BOGAN, INC.

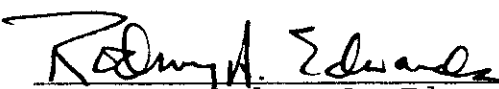
By:   
Rodney A. Edwards,  
Attorney for Plaintiff

DOERNER, STUART, SAUNDERS,  
DANIEL & LANGENKAMP

By:   
William H. Hinkle,  
Attorneys for Defendants

CERTIFICATE OF MAILING

I hereby certify that on this 23 day of <sup>342</sup>~~December~~, 1989, I mailed a true and correct copy of the above and foregoing Amended Judgment to: William H. Hinkle, Doerner, Stuart, Saunders, Daniel & Langenkamp, 1200 Atlas Life Building, Tulsa, Oklahoma 74103, Attorneys for Defendant, with proper postage thereon fully prepaid.

  
Rodney A. Edwards

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 22 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

KER-BAR PIPE & SUPPLY, INC.,  
a Texas corporation,

Plaintiff,

vs.

No. 79-C-552-~~D~~

DANNY HILLENBERG, an individual  
d/b/a HILLENBERG PIPE & SUPPLY,  
and GERALD A. ESKRIDGE, an  
individual,

Defendant.

JOURNAL ENTRY OF JUDGMENT AGAINST  
THE DEFENDANT GERALD A. ESKRIDGE

Now on this 9th day of January, 1980, the cause of action against the defendant Gerald A. Eskridge ("Eskridge") comes on regularly for disposition for failure of defendant Eskridge to answer the Complaint in this case. Plaintiff Ker-Bar Pipe & Supply, Inc. ("Ker-Bar") appears by its attorney, Charles W. Shipley, and the defendant Gerald A. Eskridge ("Eskridge") appears by his attorney, Mr. H. Richard Raskin, and said defendant confesses judgment as set forth below.

The court, having examined the pleadings and having heard the offer to confess judgment herein by the defendant Eskridge and being fully advised in the premises, finds that:

1. That Plaintiff, Ker-Bar, is a corporation organized and existing under the laws of the State of Texas and has its principle place of business in Texas.
2. The Defendant, Danny Hillenberg ("Hillenberg") is an individual residing in Tulsa County, Oklahoma.
3. The Defendant, Gerald A. Eskridge ("Eskridge") is an individual residing in Tulsa County, Oklahoma.
4. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00.

5. This court has jurisdiction pursuant to the provisions of Title 28 U.S.C. §1332. Venue is proper in this District under Title 28 U.S.C. §1391 since all defendants are residents of this District.

6. On or about April 1, 1979, Ker-Bar purchased 65.89 tons of 4-1/2" outside diameter "L" Band Oil Country Casing Pipe, also referred to as Reject Drill Casing Pipe ("the Drill Pipe") which amounted to approximately 8,806 feet of said pipe for a price of \$19,767.00. Thereafter on or about April 5, 1979, the Drill Pipe was shipped by rail to Tulsa, Oklahoma at a cost to Ker-Bar of \$3,109.98.

7. Ker-Bar arranged to have Eskridge, who is in the business of hauling and storing materials such as this pipe, to unload the pipe from the rail car in Tulsa and to remove same to his place of business and to store it for Ker-Bar at a cost to Ker-Bar of \$500.00. Said amount was paid to Eskridge on or about April 30, 1979.

8. Thereafter on or about May 21, June 1, June 13, and July 12, 1979, Eskridge, without authorization by Ker-Bar and in violation of Ker-Bar's ownership rights in the Drill Pipe, and all without Ker-Bar's knowledge, willfully and maliciously took and converted to his own uses all of the above mentioned Drill Pipe and sold it to Hillenberg intending thereby to deprive Ker-Bar of its property or the value of its property.

9. Eskridge sold said pipe to Hillenberg at a price of approximately \$1.25 per foot at a time when the fair market value of said pipe was in excess of \$2.70 per foot.

10. Ker-Bar has expended at least \$350.00 in reasonable costs and expenses, exclusive of attorney's fees, in seeking the recovery of the value of said pipe.

11. Ker-Bar has made demand for the recovery of the full value of the pipe and including transportation, storage and recovery costs from the defendant Eskridge, but said defendant

has failed and refused to pay said amount to Ker-Bar intending thereby to deprive Ker-Bar of the value of its property.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED by this court that Ker-Bar Pipe & Supply, Inc., a Texas corporation, have and recover judgment against the defendant Gerald A. Eskridge for damages pursuant to 23 O.S. 1971 §64 for the value of the pipe at the time of conversion in the sum of \$23,376.98; plus twelve percent (12%) interest on said amount from today's date until paid in full; plus \$350.00 in reasonable costs and expenses in seeking the recovery of the value of said pipe; plus a reasonable attorney's fee of \$3,000.00; plus \$60.00 for the cost of this action.

*James O. Ellison*  
Honorable James O. Ellison  
United States District Court Judge

Date: *Jan. 22, 1980*

AGREED AS TO FORM:

*H. Richard Raskin*  
H. Richard Raskin  
Attorney for Gerald A. Eskridge

Date: *JAN 9, 1980*

CONFESSED AS CORRECT:

*Gerald A. Eskridge*  
Gerald A. Eskridge

Date: *1-1-80*

AGREED AS TO FORM:

*Charles W. Shipley*  
Charles W. Shipley  
Attorney for Ker-Bar Pipe &  
Supply, Inc.

Date: *JAN 8, 1980*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED  
JAN 21 1980  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

DON POGUE and BARBARA POGUE, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
TWILLA WOLF, )  
 )  
Defendant. )

No. 79-C-442-d 61 ✓

JOURNAL ENTRY OF JUDGMENT

NOW, on this 21 day of January, 1980, this matter comes on before the undersigned Judge of the District Court with the plaintiffs appearing by and through their attorney of record, Mr. Ken Ray Underwood, and the defendant appearing by and through her attorney of record, Mr. Allen M. Smallwood. The Court having heard testimony and being fully advised in the premises makes the following findings of fact:

That the Court has both subject matter and personal jurisdiction necessary to make these findings of fact and render this judgment.

The Court further finds that upon these findings of fact and conclusions of law that judgment should be rendered in favor of the above-named plaintiffs, Don Pogue and Barbara Pogue, and against the above-named defendant, Twilla Wolf, in the amount of EIGHT HUNDRED FIFTY DOLLARS (\$850.00) with such amount to be inclusive of all attorney fees, court costs, and any other amounts which should accrue.

The Court further finds that with the agreement of all parties this judgment should be satisfied by an initial payment of the defendant of THREE HUNDRED DOLLARS (\$300.00) upon filing of this judgment with the balance to be paid within sixty (60) days of the date of this judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that upon findings of fact and conclusions of law this Court has both subject matter and personal jurisdiction over the matter and parties hereto.



IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment should be and is hereby rendered in favor of the plaintiffs, Don Pogue and Barbara Pogue, and against the defendant, Twilla Wolf, in the amount of EIGHT HUNDRED FIFTY DOLLARS (\$850.00), such figure to be inclusive of all attorney fees, court costs and any other costs which might accrue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment shall be satisfied by an initial payment of THREE HUNDRED DOLLARS (\$300.00) by the defendant upon filing of this judgment with the balance to be paid within sixty (60) days of the date of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the findings herein set out above should govern the rights, duties, and obligations of the parties hereto.

*This judgment is agreed upon by the parties.*

*Thomas R. Brett*  
THOMAS R. BRETT  
JUDGE OF THE UNITED STATES  
DISTRICT COURT

*Don Pogue*  
DON POGUE, Plaintiff

*Barbara Pogue*  
BARBARA POGUE, Plaintiff

*Ken Ray Underwood*  
KEN RAY UNDERWOOD  
Attorney for Plaintiff

*Twilla Wolf*  
TWILLA WOLF, Defendant

*Allen M. Smallwood*  
ALLEN M. SMALLWOOD  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 21 1980

OMA WILSON,

Plaintiff,

vs.

GUARANTY NATIONAL BANK, a  
National banking corporation,

Defendant.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 78-C-289-*BT*

JUDGMENT

This matter came on regularly for trial on the 7th day of January, 1980, before the undersigned District Judge. Plaintiff appeared in person and by and through her attorney of record, John B. Wimbish of the firm of Ungerman, Conner, Little, Ungerman and Goodman. Defendant appeared by and through it's attorneys of record, Edwin S. Hurst and Randolph L. Strnad of the firm of Boone, Smith, Davis & Minter. The Court having considered the evidence and arguments of counsel and having entered herein it's Findings of Fact and Conclusions of Law,

IT IS ORDERED AND ADJUDGED that the Plaintiff, Oma Wilson, take nothing, the action be dismissed on the merits, all prayers for relief be and are hereby denied and the Defendant, Guaranty National Bank, receive it's costs herein expended.

Entered as of this 21 day of January, 1980.

*Thomas R. Brett*  
UNITED STATES DISTRICT JUDGE

Approved as to form:

*John B. Wimbish*  
John B. Wimbish,  
Attorney for Plaintiff

*Edwin S. Hurst*  
Edwin S. Hurst,  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CUMMINS CONSTRUCTION COMPANY, INC., )  
a corporation, )

Plaintiff, )

-vs- )

OTTO RONE, BOBBY MCGUYER, and RONE )  
& MCGUYER, INC., a corporation, )

Defendants. )

No. 78-C-560-*e b f*

**FILED**

JAN 21 1980

ORDER OF DISMISSAL

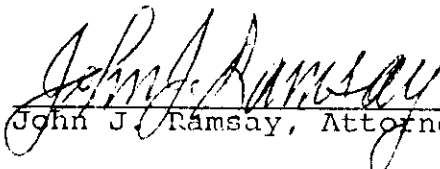
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

This matter comes on for hearing on this 18 day  
of January, 1980, upon the plaintiff's Motion  
To Dismiss without prejudice. The Court finds that the parties,  
by and through their attorneys, and each of them, have agreed  
that the above entitled cause should be dismissed on plaintiff's  
motion, without prejudice to either party, and without the  
awarding of attorney fees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that  
the above entitled cause is hereby dismissed without prejudice  
to either party.

  
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:

  
John J. Ramsay, Attorney for Plaintiff

  
John P. Scott, Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

JOHN F. BENNETT,

Plaintiff,

vs.

SEARS ROEBUCK CO., a foreign  
corporation, and KELLY SPRINGFIELD  
TIRE COMPANY, a foreign corporation,

Defendants,

EXCALIBUR INSURANCE COMPANY,

Intervenor.

No. 78-C-378-C

**F I L E D**

**JAN 21 1980**

THE CHIEF FREIGHT LINES COMPANY,

Plaintiff,

vs.

KELLY SPRINGFIELD TIRE COMPANY, a  
foreign corporation, and SEARS  
ROEBUCK CO., a foreign corporation,

Defendants.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 78-C-389-C

ORDER DISMISSING INDIVIDUAL  
DEFENDANT, GOODYEAR  
TIRE & RUBBER COMPANY

NOW, on this 1st day of November, 1979, this matter coming on for hearing before the Court for supplemental pretrial hearing, the plaintiff, John F. Bennett, the Intervenor, Excalibur Insurance Company, in Case No. 78-C-378-C, and the plaintiff in Case No. 78-C-389-C move the Court for permission to dismiss without prejudice the individual defendant, Goodyear Tire & Rubber Company, which Motion was granted.

IT IS THEREFORE ORDERED by the Court that the Motions to Dismiss of the plaintiffs, John F. Bennett and the Chief Freight Lines Company, and the Intervenor, Excalibur Insurance Company, be sustained. The individual defendant, Goodyear Tire & Rubber Company, is hereby dismissed as a defendant in each of the above styled and numbered causes, without prejudice.

15/ James O. Ellison  
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

FILED

WILLIAM J. KIRBERGER and JOHN )  
PETTIGROVE, Partners in TOWN & )  
COUNTRY MOTORS, a partnership, )  
and TOWN & COUNTRY MOTORS, INC., )  
an Oklahoma Corporation, )

Plaintiffs, )

vs. )

INTERNATIONAL HARVESTER COMPANY, )

Defendant. )

No. 77-C-460-~~PL~~ C

JAN 14 1980  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

The Court, having been advised by counsel for all parties that the within action has been settled and compromised, and noting that Plaintiffs filed their Dismissal With Prejudice on December 14, 1979, finds that this matter should be dismissed with prejudice.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that this cause be and it is hereby dismissed with prejudice.

Dated this 14<sup>th</sup> day of January, 1980.

H. DALE COOK

UNITED STATES DISTRICT JUDGE

WE MOVE FOR THIS ORDER:

Fred S. Nelson  
Fred S. Nelson  
Attorney for Plaintiffs

Ron Main  
Ron Main  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JIMMY JOE EVATT and  
ONA FAYE EVATT,

Defendants.

CIVIL ACTION NO. 75-C-235-C

**FILED**

JAN 14 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

J U D G M E N T

This matter comes on for consideration this 14<sup>th</sup> day of January, 1980, the Plaintiff, United States of America, appearing by its attorneys, Robert P. Santee, Assistant United States Attorney, and George Carrasquillo, Assistant United States Attorney; and, the Defendants, Jimmy Joe Evatt and Ona Faye Evatt, appearing by their attorney, Cecil G. Drummond.

The Court finds that judgment should be entered in favor of the Plaintiff and against the Defendants in the amount of \$14,932.29, plus interest thereon at the rate of 5-7/8 percent per annum from the date of this judgment, until paid. The Court further finds that annual payments, by agreement, are to be made on such judgment over a ten-year period in even installments of principal and interest.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff have and recover judgment against the Defendants, Jimmy Joe Evatt and Ona Faye Evatt, in the amount of \$14,932.29, plus interest from the date of such judgment at 5-7/8 percent per annum, which judgment, by agreement, is to be paid by these Defendants to Plaintiff in ten equal installments of principal and interest.

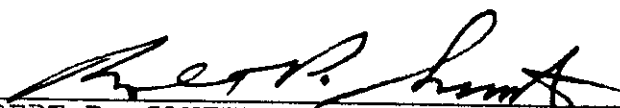
H. DALE COOK


UNITED STATES DISTRICT JUDGE

APPROVED:

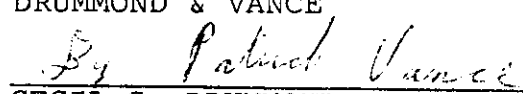
UNITED STATES OF AMERICA

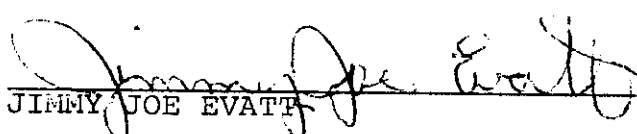
HUBERT H. BRYANT  
United States Attorney

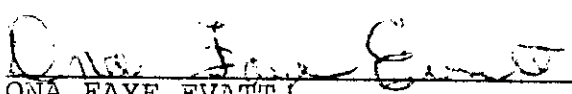
  
ROBERT P. SANTEE  
Assistant United States Attorney

  
HUBERT A. MARLOW  
Assistant United States Attorney

DRUMMOND & VANCE

  
CECIL G. DRUMMOND  
Attorney for Defendants,  
Jimmy Jie Evatt and  
Ona Faye Evatt

  
JIMMY JOE EVATT

  
ONA FAYE EVATT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
and JOHN R. THOMAS, Special )  
Agent, Internal Revenue Service, )  
 )  
Petitioners, )

)

No. 79-C-480-C

AMERICAN STATE BANK and )  
WILLIAM X. SMITH, Vice )  
President, )

1

DR. STANLEY J. GELLER, et al., )

1

FILED  
JAN 14 1980  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

## ORDER DISCHARGING RESPONDENTS AND DISMISSAL

On this 14<sup>th</sup> day of January, 1980, Petitioners' Motion to Discharge Respondents and to Dismiss came on for decision and the Court finds that Respondents have now complied with the three Internal Revenue Service Summons served on March 27, 1979, that further proceedings herein are unnecessary, and that the Respondents, American State Bank and William X. Smith, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Respondents, American State Bank and William X. Smith, be and they are hereby discharged from any further proceedings herein and this action be and the same hereby is dismissed.

**DALE COOK**

UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
and JOHN R. THOMAS, Special  
Agent, Internal Revenue Service,

Petitioners,

vs.

BOULDER BANK & TRUST COMPANY  
and JO POTTS, Cashier,

Respondents,

DR. STANLEY J. GELLER, et al.,

Petitioners.

No. 79-C-482-C

FILED

JAN 14 1980

Jack C. Silver, Clerk

ORDER DISCHARGING RESPONDENTS  
AND DISMISSAL

U. S. DISTRICT COURT

On this 14<sup>th</sup> day of January, 1980, Petitioners' Motion to Discharge Respondents and to Dismiss came on for decision and the Court finds that Respondents have now complied with the three Internal Revenue Service Summons served on March 22, 1979, that further proceedings herein are unnecessary, and that the Respondents, Boulder Bank & Trust Company and Jo Potts, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Respondents, Boulder Bank & Trust Company and Jo Potts, be and they are hereby discharged from any further proceedings herein and this action be and the same hereby is dismissed.

H. DALE COOK

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
and JOHN R. THOMAS, Special  
Agent, Internal Revenue Service,

Petitioners,

vs.

BANK OF COMMERCE & TRUST  
COMPANY and DAISYE HOWELL,  
Cashier,

Respondents,

DR. STANLEY J. GELLER, et al.,

Petitioners.

No. 79-C-483-C

**FILED**

JAN 14 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER DISCHARGING RESPONDENTS  
AND DISMISSAL

On this 14<sup>th</sup> day of January, 1980, Petitioners' Motion to Discharge Respondents and to Dismiss came on for decision and the Court finds that Respondents have now complied with the three Internal Revenue Service Summons served on March 22, 1979, that further proceedings herein are unnecessary, and that the Respondents, Bank of Commerce & Trust Company and Daisye Howell, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Respondents, Bank of Commerce & Trust Company and Daisye Howell, be and they are hereby discharged from any further proceedings herein and this action be and the same hereby is dismissed.

H. DALE COOK

UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAN 14 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

INTERNATIONAL INSURANCE COMPANY,	)	
an Illinois corporation,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	NO. 77-C-283-E
	)	
INDEPENDENT SCHOOL DISTRICT	)	
NO. 1 of TULSA COUNTY, OKLAHOMA,	)	
et al,	)	
	)	
Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

The Court being fully advised in the premises and on consideration of the parties' Joint Stipulation of Dismissal With Prejudice of all claims and the parties' request for Order of Dismissal With Prejudice of all claims, finds that such Order should be issued.

BE IT THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's cause filed herein be and the same is hereby dismissed with prejudice.

BE IT FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants' School District and Board Members counter-claim against the Plaintiff be and the same is hereby dismissed with prejudice.

Done and dated this 14<sup>th</sup> day of January, 1980.

S/ JAMES O. ELLISON

James O. Ellison  
United States District Judge

FILED

JAN 14 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 79-C-508-C
	)	
LARRY R. SCHELL and	)	
SHEILA C. SCHELL,	)	
	)	
Defendants.	)	

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 14<sup>th</sup>  
day of January, 1980, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; and the Defendants,  
Larry R. Schell and Sheila C. Schell, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Larry R. Schell and  
Sheila C. Schell, were served by publication as shown on the  
Proof of Publication filed herein.

It appearing that the Defendants, Larry R. Schell and  
Sheila C. Schell, have failed to answer herein and that default  
has been entered by the Clerk of this Court.

The Court further finds that this is a suit based  
upon a mortgage note and foreclosure on a real property mortgage  
securing said mortgage note upon the following described real  
property located in Delaware County, Oklahoma, within the Northern  
Judicial District of Oklahoma:

Lot Two (2), Block Two (2), of JOHN COX FIRST  
ADDITION to the Town of Grove, Oklahoma, according  
to the official plat thereof.

THAT the Defendants, Larry R. Schell and Sheila C.  
Schell, did, on the 11th day of May, 1978, execute and deliver  
to the United States of America, acting through the Farmers Home  
Administration, their mortgage and mortgage note in the sum  
of \$23,700.00 with 8 percent interest per annum, and further  
providing for the payment of monthly installments of principal  
and interest.

The Court further finds that Defendants, Larry R. Schell and Sheila C. Schell, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$25,821.88 as unpaid principal with interest thereon at the rate of 8 percent per annum from October 5, 1979, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Larry R. Schell and Sheila C. Schell, in rem, for the sum of \$25,821.88 with interest thereon at the rate of 8 percent per annum from October 5, 1979, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof.

S/ JAMES O. ELLISON

---

UNITED STATES DISTRICT JUDGE

APPROVED:

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

A handwritten signature in dark ink, appearing to read "R. P. Santee", written over a horizontal line.

ROBERT P. SANTEE  
Assistant United States Attorney

IN THE DISTRICT COURT WITHIN AND FOR OTTAWA COUNTY  
STATE OF OKLAHOMA

BOB WILSON, )  
)  
Plaintiff, )  
)  
vs. )  
)  
LEE JEFFERY, Individually )  
and in his official capa- )  
city as Superintendent of )  
Wyandotte, Oklahoma; ROBERT )  
DRUSE, LARRY DAVIS, ELLEN )  
MONROE, LOUISE EASLEY and )  
RALPH HIGHFILL, Individual- )  
ly and in their official )  
capacity as members of the )  
Board of Education of Inde- )  
pendent School District No. )  
1, Wyandotte, Ottawa County, )  
Oklahoma; and INDEPENDENT )  
SCHOOL DISTRICT NO. 1 of )  
Wyandotte, Ottawa County, )  
Oklahoma. )  
)  
Defendants. )

Case No. 78-C-275-C

**FILED**

14 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

Upon the Joint Application and Stipulation of the plaintiff and defendants and each of them to dismiss the complaint herein and for good cause shown, the Court finds that:

1. The plaintiff's complaint filed herein should be dismissed by stipulation pursuant to the provisions of Rule 41 (a) (1) (2) of the Federal Rules of Civil Procedure;

2. That said dismissal is with prejudice and does operate as adjudication upon the merits of the causes of action contained in said complaint and that each party is responsible for its own attorney's fees and costs incurred herein.

IT IS THEREFORE, ORDERED BY THE COURT that the above styled and captioned cause should be and the same is dismissed with prejudice and that the parties herein are responsible for the payment of their own attorney's fees and costs incurred.

H. DALE COOK

UNITED STATES DISTRICT JUDGE

**United States District Court**FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 79-C-126-BT

The UNITED STATES of AMERICA,  
Plaintiff,  
vs.  
JAMES W. TUCKER,  
Defendant.

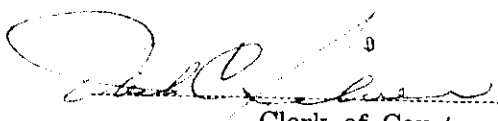
**JUDGMENT**

This action came on for trial (hearing) before the Court, Honorable THOMAS R. BRETT  
, United States District Judge, presiding, and the issues having been duly tried  
(heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiff take nothing and that the  
Defendant recover of the Plaintiff its costs of action. Each side  
is to pay their respective attorney's fees.

**FILED**  
JAN 11 1980  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 11th day  
of January, 19 80.

  
Clerk of Court  
JACK C. SILVER



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ROBERT E. FEELER,

Plaintiff

vs.

NATIONAL ZINC COMPANY, INC.,  
a corporation,

Defendant

FRIEDMAN & SON, INC., a  
foreign corporation,

Plaintiff

vs.

NATIONAL ZINC COMPANY, INC.,  
a corporation,

Defendant

No. 77-C-458-B

**FILED**

JAN 11 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 77-C-457-B

ORDER

NOW on this 18th day of December, 1979, the above matter comes on for non-jury trial, the Plaintiffs appearing by and through their attorney, Dale Warner, of Hopkins, Warner & King, Attorneys at Law, the Defendant appearing by and through its attorney, J. Warren Jackman, of Pray, Walker, Jackman, Williamson & Marlar, Attorneys at Law, and the Plaintiffs requesting permission of the Court to dismiss Plaintiffs' Causes of Action without prejudice; the Defendant having stated that it had no objection to such dismissal, and the Court being fully advised in the premises, finds that the within causes of action should be dismissed without prejudice.

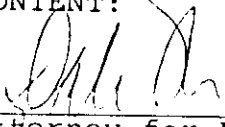
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled causes, consolidated for trial, be and the same are

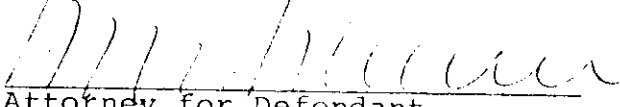
hereby dismissed without prejudice. The parties shall bear their respective costs.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND  
CONTENT:

  
Attorney for Plaintiffs

  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ROBERT E. FEELER,  
Plaintiff

vs.

NATIONAL ZINC COMPANY, INC.,  
a corporation,

Defendant

FRIEDMAN & SON, INC., a  
foreign corporation,

Plaintiff

vs.

NATIONAL ZINC COMPANY, INC.,  
a corporation,

Defendant

No. 77-C-458-B

**FILED**

JAN 11 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 77-C-457-B

ORDER

NOW on this 18th day of December, 1979, the above matter comes on for non-jury trial, the Plaintiffs appearing by and through their attorney, Dale Warner, of Hopkins, Warner & King, Attorneys at Law, the Defendant appearing by and through its attorney, J. Warren Jackman, of Pray, Walker, Jackman, Williamson & Marlar, Attorneys at Law, and the Plaintiffs requesting permission of the Court to dismiss Plaintiffs' Causes of Action without prejudice; the Defendant having stated that it had no objection to such dismissal, and the Court being fully advised in the premises, finds that the within causes of action should be dismissed without prejudice.

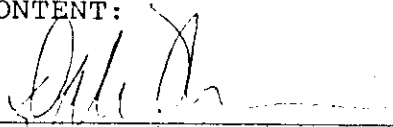
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled causes, consolidated for trial, be and the same are

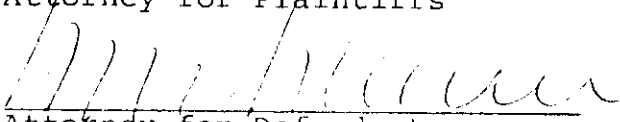
hereby dismissed without prejudice. The parties shall bear their respective costs.

S/ THOMAS R. DRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND  
CONTENT:

  
Attorney for Plaintiffs

  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**JAN 10 1980**

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

FARMER'S INSURANCE COMPANY, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DARLENE WILLIAMS, TOMMY BRITT and )  
TOMMY DEWAYNE TURNER, )  
 )  
Defendants. )

No. 79-C-237-E

ORDER

The Court has before it for consideration the motion of Plaintiff, Farmer's Insurance Company, Inc., asking that summary judgment in its favor be granted against Defendants. The Court has reviewed the entire file in this matter including the briefs filed herein by the parties. This action is one for declaratory judgment pursuant to 28 USC §2201 et seq.

The following facts are taken from the transcript of the preliminary hearing styled State of Oklahoma, Plaintiff, versus Tommy Marcel Britt, Defendant, Case Number CRF-77-2019. On July 29, 1977, Tommy Britt and Tommy Dewayne Turner left work at approximately 3:30 p.m. and went to a bar where they each drank several beers. They were given a ride back to the job site where they picked up Turner's truck. Then they proceeded to a friend's house on North Lewis. While traveling on North Lewis, Britt began to examine a 9 millimeter automatic pistol which Turner had in his pickup truck. Britt placed a shell in the chamber and played with the gun while the two were in route to the house of Britt's friend. When they arrived at the house, they stayed a few moments then departed. As they left the residence, Turner pulled his truck out of the driveway into the northbound lane entering traffic in front of the vehicle driven by Michael Jackson with his passengers, Darlene Williams, Dee Williams, Carrie Williams and Sylvester Hall. Both vehicles proceeded north to a stop light at 46th and Lewis. It appears from the transcript that as the vehicles were sitting side by side, Michael Jackson turned and said something to Tommy Britt who made a reply. Then Britt pulled out the gun and pointed it at the car.

The light changed and Michael Jackson took off in his car. The Turner vehicle followed and Britt began shooting at the Jackson vehicle. Britt hit the Jackson vehicle approximately four times as evidenced by the bullet holes in the car. One of the bullets which was fired by Britt struck Carrie Williams, a passenger in the Jackson vehicle, in the back of the head, causing her death.

Defendant, Darlene Williams, has filed a lawsuit in District Court in Tulsa County, Case Number CT-78-962 against Tommy Britt and Tommy Dwayne Turner for the loss of service of minor child and damages resulting therefrom. The Defendant, Darlene Williams, contends that a homeowner's insurance policy number 08-2095-8208 issued by Farmer's to Sarah Lee Britt, (mother of Tommy Britt) which was in effect on July 29, 1977, provides coverage for Tommy Britt's liability for the death of Carrie Williams.

#### Coverage Under the Policy

Conflicting claims have resulted because of the interpretation of the homeowner's insurance policy. The Defendant, Darlene Williams, urges that the policy should cover Britt's liability for the death of Carrie Williams. She maintains the coverage exists if there is an unintended result of an intentional act. The Defendant cites several cases where coverage was provided under insurance policies for certain tortious acts. The Plaintiff, however, contends that no coverage was ever intended to be provided for such an act as found in this case because the policy covers only accidents which result in bodily harm. Plaintiff further argues that even if the act in question were covered by the policy that it was specifically excluded by the policy.

The pertinent policy provisions are noted in the following policy language:

(Under Section II titled Coverage)  
"Coverage - Personal liability. This company agrees to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damages, to which this insurance applies, caused by an occurrence."

(Additional Definitions)  
"5. 'Occurrence': means an accident, including

injurious exposure to conditions, which results, during the policy term, in bodily injury or property damage." (emphasis supplied)

That the described policy provides under Exclusions:

"This policy does not apply: a. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of: (2) any motor vehicle owned or operated by, or rented or loaned to any insured; ...

f. to bodily injury or property damage which is either expected or intended from the standpoint of the insured."

Rule 56(c), Fed.R.Civ.P. provides that upon a motion for summary judgment:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

See Carter v. Stanton, 405 U.S. 669 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202 (Tenth Cir. 1972); Williams Petroleum Co. v. Midland Cooperatives, Inc., 539 F.2d 694 (Tenth Cir. 1976); Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230 (Tenth Cir. 1975).

There are no factual disputes involved herein. Rather, the sole question is whether the policy covers the situation presented herein. This is, therefore, an appropriate case for summary judgment.

The policy of insurance must be construed as a whole, all of its clauses to be construed together and given effect if possible. See National Aviators Underwriters v. Altus Flying Services, Inc., 555 F.2d 778 (Tenth Cir. 1977); Hardberger & Smylie v. Employers Mutual Life Ins. Co., 444 F.2d 1318 (Tenth Cir. 1971); Schultz v. Commercial Standard Ins. Co., 308 F.Supp. 202 (W.D. Okla. 1970). It is not permissible to lift one clause from an insurance contract and attempt to attach to it a

different meaning when standing alone. Treasure Craft Jewelers, Inc. v. Jefferson Ins. Co., 431 F.Supp. 1160 (E.D. Pa. 1977), aff'd 583 F.2d 650 (Third Cir. 1978).

An insurance policy is a contract and should be governed accordingly. The terms of a contract are restricted to the intentions of the parties. 15 O.S. 164. The policy terms provide coverage for accidental injuries.

Under 15 O.S. 160, the Court is to apply the normal and ordinary meaning of words used in a contract. Construing the word 'accident' in its ordinary meaning, the Court will not allow the term to encompass the activities of Britt's deliberate and repeated shooting in this instance.

The Tenth Circuit has reviewed the term 'accident' and described it by using the Webster's Dictionary definition as follows:

"Accident. An event that takes place without one's foresight or expectation; an undesigned sudden and unexpected event, chance, contingency."

Such an event as an accident within an insurance policy is a distinctive event that takes place by some unexpected happening. Leggett v. Home Indemnity Company, 461 F.2d 257 (Tenth Cir. 1972).

By reviewing its language, it is evident that the Farmer's Insurance policy was never intended to provide coverage for a situation such as the present case. The Court will not extend the definition of an accident to the actions of Britt of repeatedly firing shots at the Jackson car.

Therefore, the Court holds that no insurance coverage was provided under the terms of the insurance contract in question.

#### The Exclusion

Assuming arguendo that the policy did cover the act of Britt, the exclusion clause would negate coverage. The insurance contract specifically excluded coverage for injuries which were either expected or intended from the standpoint of the insured.

In construing an insurance contract, exclusions are as much a part of the contract as the stated coverage, and cannot be



ignored. Schultz v. Commercial Standard Ins. Co., supra. The mere fact that constructions affording coverage are to be favored does not prevent an insurer from limiting its liability. See Traverse v. World Service Life Ins. Co., 436 F.Supp. 810 (W.D. Okla. 1977).

The Defendant urges that although Britt intentionally fired the gun at the Jackson car that this does not conclusively establish an intention to fatally injure Carrie Williams. However, where an intentional act results in injuries which are the natural and probable consequence of the act, the injuries are considered to be intentional. Rankin v. Farmers Elevator Mutual Ins. Co., 393 F.2d 718 (Tenth Cir. 1968). The fatal injury of Carrie Williams was a consequence of the deliberate shooting by Britt of the car full of people and should have been expected and hence intended.

Under the exclusion clauses of the policy, bodily injury which was intended to be inflicted by the insured on another is not covered by the policy. See Blue Ridge Ins. Comp., v. Nicholas, 425 F.Supp. 827 (E.D. Mo. 1977); Pendergraft v. Commercial Standard Fire & Marine Co., 342 F.2d 427 (Tenth Cir. 1965).


As has been stated above, the Court's duty is to interpret and construe the contract resolving doubt in favor of coverage. However, it is not the Court's duty to rewrite the contract to afford coverage where none was intended and where there is no doubt.

After a careful review of the insurance policy and the applicable authorities, this Court is of the opinion that the policy issued by Farmer's to Britt's mother does not cover the liability arising from the death of Carrie Williams. There being no material issues of fact, summary judgment in favor of Farmer's Insurance Co. and against Defendants Darlene Williams, Tommy Britt and Tommy Dewayne Turner is therefore proper.

IT IS THEREFORE ORDERED that the Motion for Summary

Judgment of Farmer's Insurance Company be sustained.

IT IS SO ORDERED this 1<sup>st</sup> day of ~~December~~ <sup>January</sup>, 1979.

  
JAMES O. ELLISON  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
JAN 10 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
THOMAS S. STEED, )  
 )  
Defendant. )

CIVIL ACTION NO. 79-C-421-C

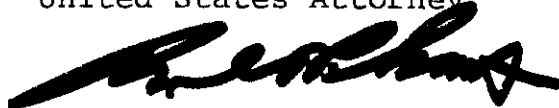
NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff  
herein, by and through its attorney, Robert P. Santee, Assistant  
United States Attorney for the Northern District of Oklahoma,  
and hereby gives notice of its dismissal, pursuant to Rule 41,  
Federal Rules of Civil Procedure, of this action, without  
prejudice.

Dated this 10th day of January, 1980.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney



ROBERT P. SANTEE  
Assistant United States Attorney

**FILED**

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 78-C-324-E

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ASHLAND OIL, INC.,  
Plaintiff,  
vs.  
PHILLIPS PETROLEUM COMPANY,  
Defendant,  
and  
UNITED STATES OF AMERICA,  
Intervenor.

No. 67-C-238 ✓

FILED

*pm* JAN 9 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

In accordance with the mandate of the Tenth Circuit  
Court of Appeals in this case, the judgment herein is hereby  
modified to include prejudgment interest as provided by law.

Dated this 8<sup>th</sup> day of January, 1980.

Luther Bohannon  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARY K. BROWN, DEBORAH J. BROWN,  
COUNTY TREASURER, Tulsa County,  
Oklahoma, and BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

CIVIL ACTION NO. 79-C-509-~~EL~~

FILED

JAN - 8 1980

Jack Silver, Clerk

U. S. DISTRICT COURT

STIPULATION OF DISMISSAL

COME NOW the United States of America, Plaintiff, by and through its attorney, Robert P. Santee, Assistant United States Attorney, for the Northern District of Oklahoma, and COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendant, by and through their attorney, Deryl L. Gotcher, Jr., and stipulate and agree that this action be and that the same is herewith dismissed, without prejudice, each party to bear its own costs.

UNITED STATES OF AMERICA

HUBERT H. BRYANT

United States Attorney



ROBERT P. SANTEE

Assistant United States Attorney

*for* John F. Rees Asst. Dist. Atty.  
DERYL L. GOTCHER, JR.,  
Assistant District Attorney for  
Defendant, County Treasurer, Tulsa  
County, Oklahoma, and Board of  
County Commissioners, Tulsa County,  
Oklahoma

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE 8th JAN 8 1980  
NORTHERN DISTRICT OF OKLAHOMA

Clarence Hoffman,

Plaintiff,

vs

Dick Eutsler, et al,

Defendants.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 79-C-720-E

ORDER OF DISMISSAL

Upon this 8<sup>th</sup> day of January, 1980, upon the motion of  
the plaintiff, it is

ORDERED by the Court that the above entitled cause be, and  
the same hereby is dismissed without prejudice.

S/ JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

FILED

JAN 8 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

NATIONAL SERVICE INDUSTRIES, INC., )  
a Delaware corporation, and )  
NATIONAL SERVICE PROPERTIES, INC., )  
a Tennessee corporation, )

Plaintiffs, )

vs. )

CIV-79-C-115-qE

E. V. COX CONSTRUCTION CO., an )  
Oklahoma corporation, and MID- )  
CONTINENT CASUALTY COMPANY, an )  
Oklahoma corporation, )

Defendants. )

ORDER OF DISMISSAL WITH PREJUDICE

The court, upon the joint motion of the parties, hereby dismisses with prejudice the complaint and amended complaint of plaintiffs, including any action alleged therein, and the amended counterclaim of E. V. Cox Construction Co., Inc., including any action alleged therein. Each party shall suffer its own costs.

Entered: January 8, 1980

S/ JAMES O. ELLISON

James O. Ellison  
United States District Judge

Approved:

Conner, Winters, Ballaine,  
Barry & McGowen  
2400 First National Tower  
Tulsa, Oklahoma 74103

By Dennis R. Deillo  
Attorneys for Plaintiffs

Looney, Nichols, Johnson & Hayes  
219 Couch Drive  
Oklahoma City, Oklahoma 73102

By John B. Hayes  
Attorneys for Defendants



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN - 8 1980

Jack C. Silver, Clerk:  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,  
and JOHN R. THOMAS, Special  
Agent, Internal Revenue Service,

Petitioners,

vs.

F&M BANK & TRUST COMPANY, and  
MARY SIMMONS, Cashier,

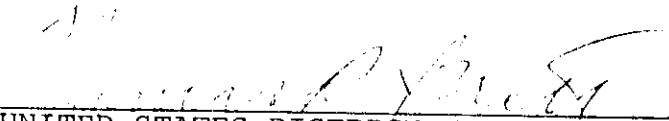
Respondents.

No. 79-C-481-D

ORDER DISCHARGING RESPONDENTS  
AND DISMISSAL

On this 7th day of January, 1980, Petitioners' Motion to Discharge Respondents and to Dismiss came on for decision and the Court finds that Respondents have now complied with the three Internal Revenue Service Summons served on March 27, 1979, that further proceedings herein are unnecessary, and that the Respondents, F&M Bank & Trust Company and Mary Simmons, should be discharged and this action dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Respondents, F&M Bank & Trust Company and Mary Simmons, be and they are hereby discharged from any further proceedings herein and this action be and the same hereby is dismissed.

  
UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

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7th

day of January, 1980, Petitioners'

Dismissed.

A/ Thomas R. Brett  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 8 1980 1c

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JAMES B. HAMPTON, )  
 )  
Defendant. )

CIVIL ACTION NO. 79-C-447-BT ✓

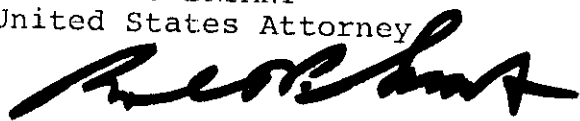
NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff  
herein, by and through its attorney, Robert P. Santee, Assistant  
United States Attorney for the Northern District of Oklahoma,  
and hereby gives notice of its dismissal, pursuant to Rule 41,  
Federal Rules of Civil Procedure, of this action, without prejudice.

Dated this 8 day of January, 1980.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAN 8 1980

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

CARL MAYFIELD,  
Defendant.

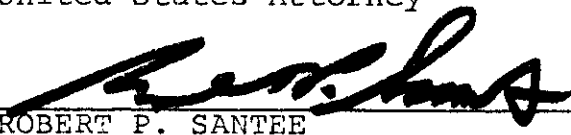
CIVIL ACTION NO. 79-C-608-Bt

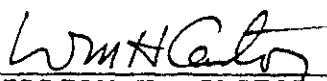
STIPULATION OF DISMISSAL

COME NOW the United States of America by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and Carl Mayfield, by and through his attorney, William H. Castor, and herewith stipulate that this action be and the same is hereby dismissed without prejudice.

Dated this 19<sup>th</sup> day of December, 1979.

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
WILLIAM H. CASTOR  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAN 8 1980

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

DAVID L. SMALL,  
Defendant.

CIVIL ACTION NO. 79-C-606Bt

Jack O. Small, Clerk  
U. S. DISTRICT COURT

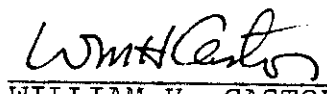
STIPULATION OF DISMISSAL

COME NOW the United States of America by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and David L. Small by and through his attorney, William H. Castor, and herewith stipulate that this action be and the same is hereby dismissed without prejudice.

Dated this 19<sup>th</sup> day of December, 1979.

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
WILLIAM H. CASTOR  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
JAN - 8 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

CHARLES E. RAKE,

Plaintiff,

-vs-

METROPOLITAN LIFE INSURANCE COMPANY,  
a foreign insurance company,

Defendant.

No. 79-C-31-BT

ORDER OF DISMISSAL

On this 8<sup>th</sup> day of January, 1980, upon written application of the parties for (1) an order allowing Plaintiff to withdraw \$3,500 from the registry of the Court, which is the sum remaining of the \$21,000 deposited by the Defendant with the Court, and (2) for an order of dismissal with prejudice of the complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to allow the Plaintiff to withdraw the funds described and to dismiss the complaint with prejudice to any future action, the Court being fully advised in the premises, finds that Plaintiff should be allowed to withdraw the sum of \$3,500, being the amount remaining deposited with the Court, and further finds that said complaint should be dismissed.

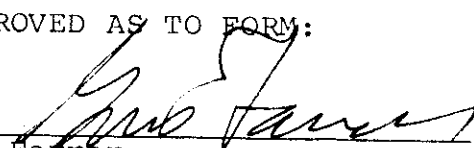
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that (1) the Plaintiff be allowed to withdraw the sum of \$3,500 from the registry of the Court, which is the sum remaining of the \$21,000 deposited by the Defendant with the Court, and (2) that the Complaint and all causes of action of the Plaintiff filed herein against the Defendant be and the same are hereby dismissed with prejudice to any further action.

S/ THOMAS R. BRETT

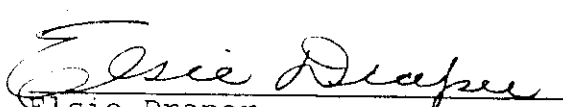
NOTE: THIS ORDER IS TO BE MAILED  
BY MOVING TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

Thomas R. Brett  
U.S. District Judge

APPROVED AS TO FORM:

  
Gus Farrar

Attorney for Plaintiff

  
Elsie Draper

Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 7 1980 CS

SAM E. WOMBLE,

Plaintiff,

vs.

UNITED STEELWORKERS OF AMERICA,  
a labor organization,

Defendants.


Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 77-C-284 ✓

DISMISSAL

This matter came on for trial before me, the undersigned Judge, on this the 17th day of December, 1979, pursuant to due notice thereof furnished to both parties. The Defendant herein, United Steelworkers of America, a labor organization, was represented by its attorney, John M. Keefer, and the Plaintiff herein, Sam E. Womble, although duly notified as to the date, time and place of this hearing, failed to appear. With regard to such notice, the Court finds that the Plaintiff herein was not only furnished with written notice dated November 16, 1978, setting forth the date, time, and place of trial, but also that such notice was communicated to the Plaintiff herein telephonically by an employee of the Court Clerk's office. Under these circumstances, the Court finds that this matter should be dismissed without prejudice.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the above-entitled cause be, and the same is hereby dismissed without prejudice.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA **FILED**

JACK SHIPLEY, Individually and as husband  
of Kay Shipley, Deceased, and as Co-  
Administrator of the Estate of Kay Shipley,  
Deceased, and John L. Westmoreland, Jr.,  
Co-Administrator of the Estate of Kay  
Shipley, Deceased,

Plaintiffs,

vs.

THOMASTON COTTON MILLS, INC., a Georgia  
Corporation, et al.,

Defendants.

JAN 4 1980 *hm*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 79-C-536-E ✓

O R D E R

The Court has before it for consideration Plaintiffs' Motion to Remand and the Motion of Defendant, Thomaston Cotton Mills, to Dismiss John L. Westmoreland as a party plaintiff. Plaintiffs' Motion is grounded upon the fact that Westmoreland is a citizen of Georgia, as is Defendant, Thomaston Cotton Mills, by reason of its being a Georgia corporation. The connection between the motions is apparent.

The parties are in substantial agreement as to the sequence of events in this case.

This action was originally filed in the District Court of Okmulgee County, State of Oklahoma, on October 1, 1976. Plaintiffs' Second Amended Petition, filed January 6, 1979, was styled as follows:

JACK SHIPLEY, Individually and as  
Husband of KAY SHIPLEY, Deceased, and as  
Administrator of the Estate of KAY SHIPLEY,

Plaintiff,

vs.

ABERSON'S ALLEY, an Oklahoma Corporation;  
RUFF N' READY UNDERWARE COMPANY, a Vermont  
Corporation; EDGEWOOD CHENILLE, INC., a  
Georgia Corporation; THOMASTON COTTON MILLS,  
INC., a Georgia Corporation; CROWN DYE  
COMPANY, a Georgia Corporation; G.A.F.  
CORPORATION aka GENERAL ANALINE AND FILM  
CORPORATION, a Georgia Corporation; WHITFIELD  
FINISHERS, INC., a Georgia Corporation, ALLEN  
GORMAN, Individually, ALLEN GORMAN d/b/a

ALLEN SALES CO., and ALLEN GORMAN SALES  
CORP.,

Defendants.

The Plaintiff, Jack Shipley, being a citizen of Oklahoma, and Defendant, Aberson's Alley, an Oklahoma corporation, diversity of citizenship obviously did not exist at the time.

On July 11, 1979, the Probate Division of the District Court of Okmulgee County entered an order in the case styled In the Matter of the Estate of Kay Shipley, No. P-76-54, whereby John L. Westmoreland, Jr. was appointed Co-Administrator of the Estate of Kay Shipley. Shortly thereafter, Westmoreland appointed Mary Bailey Romine as his agent in the State of Oklahoma.

On July 27, 1979, Plaintiff Shipley filed his application to amend the petition by adding Westmoreland as additional party plaintiff. The District Court granted the application and ordered that Westmoreland be added as a party plaintiff. Plaintiffs Shipley and Westmoreland then filed a "Second Amended Petition" which merely adopted the allegations already made in the previous petition, only adding Westmoreland as a plaintiff. After the filing of this petition, Plaintiff then dismissed without prejudice as to Defendants Aberson's Alley, Edgewood Chenille, Inc., Crown Dye Company, and Whitfield Finishers, Inc. Apparently, the events of July 27 left these parties to the action: Plaintiff Jack Shipley (an Oklahoma citizen) and John L. Westmoreland, Jr. (a Georgia citizen), Co-Administrators of the Estate of Kay Shipley versus Defendants Ruff N' Ready Underware Co., (a Vermont Corporation), Thomaston Cotton Mills, Inc. (a Georgia Corporation), and G.A.F. Corporation (a Georgia Corporation according to Plaintiffs, a Delaware corporation according to G.A.F.).

Defendants Thomaston Cotton Mills and G.A.F. filed their petition for removal on August 24, 1979. Plaintiffs' Motion to Remand was filed September 4, 1979.

The Court necessarily first directs its attention to

Defendant Thomaston Cotton Mills' motion to dismiss Westmoreland.

Thomaston Cotton Mills argues that Westmoreland's appointment was subsequent to the running of the applicable statute of limitation and that therefore he can assert no cause of action and should be dismissed as a party plaintiff.

It appears from the exhibits before the Court that Westmoreland was duly appointed Co-Administrator of Kay Shipley's Estate by the probate court. The validity of the appointment of a co-administrator cannot, of course, be collaterally attacked unless a jurisdictional defect appears on the face of the proceedings. State ex rel. American Flyers Airline Corp. v. Superior Court of Creek County, 435 P.2d 131, 133 (Okla. 1967).

A co-administrator is a necessary and essential party to a cause of action under Oklahoma law, not a mere formal or nominal party. Lane v. Hughes, 408 P.2d 281, 283 (Okla. 1965); see also Hudgens v. Cook Industries, Inc., 310 F.Supp. 32 (N.D. Okla. 1970); 1A Moore's Federal Practice ¶0.158. Once Westmoreland was appointed Co-Administrator, it was necessary that he be joined as a plaintiff, for otherwise there would be a defect in the parties. Lane v. Hughes, supra.

In the amended petition filed after Westmoreland's appointment, nothing new is alleged. The allegations of the previous petition were adopted in toto. In Saint Paul Fire and Marine Ins. Co. v. Spann, 355 P.2d 567 (Okla. 1960), the court said:

The theory of limitation statutes is that a defendant should be given notice within a certain period that he will be called upon to defend a certain action and he should have sufficient notice to inform him as to the nature of the claim so that he will be able to preserve the evidence and prepare adequately. If that is done within the statutory period, then, an amendment after the period, which does not change the operative facts substantially, will not harm the defendant. Our Court has seemed to adopt such theory in determining whether or not an amendment to a petition relates back to the time when an original petition has been filed.

In reviewing the petition and the two amendments we find the only actual change was a substitution of party plaintiff.

\* \* \* \* \*

To sustain the contention of the defendants that by substituting party plaintiffs an entirely new cause of action was commenced, would be defeating substantial justice by indulging in fine spun theories woven around technical rules of procedure or defects in pleadings that go to the form rather than the substance.

355 P.2d at 571. The court's reasoning would seem to apply with even greater force when there has merely been the addition of a party plaintiff, who has adopted all of the allegations already made, adding none of his own. Under the circumstances presented here, the Court is of the opinion that the filing of Plaintiffs' amended petition on July 27, 1979, relates back to the original filing. The claims of Westmoreland as Co-Administrator are not, therefore, barred by the statute of limitations. See Okla.Stat. tit. 12, §317; C & C Tile Co. v. Independent School Dist. No. 7 of Tulsa County, 503 P.2d 554, 559 (Okla. 1972); Saint Paul Fire and Marine Ins. Co. v. Spann, supra; Stanolind Oil & Gas Co. v. Jamison, 204 Okla. 93, 227 P.2d 404 (1950); Cowan v. Atchison, T. & S. F. Ry. Co., 66 Okla. 273, 168 P. 1015 (1917); Mostenbocker v. Shawnee Gas & Elec. Co., 49 Okla. 304, 152 p. 82 (1915); see also Travelers Ins. Co. v. Leedy, 450 P.2d 898 (Okla. 1969).

Thomaston Cotton Mills' motion to dismiss John L. Westmoreland as party plaintiff should, under the authorities cited supra, be denied.

The Court now turns to Plaintiffs' Motion to Remand. The burden of proof is on the Defendants, as the removing parties, to show that this action was properly removed. P. P. Farmers' Elevator Co. v. Farmers Elevator Mutual Insurance Co., 395 F.2d 546 (Seventh Cir. 1968); Williams v. Tri-County Community Center, 323 F.Supp. 286 (S.D. Miss. 1971), aff'd, 452 F.2d 221 (Fifth Cir. 1971); Heymann v. Louisiana, 269 F.Supp. 36 (E.D. La. 1967). Where there is any substantial doubt concerning jurisdiction of the federal court on removal, the case should be remanded and jurisdiction should be retained only where it is clear. See Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100 (1941); Morrison

v. Jack Richards Aircraft Co., 328 F.Supp. 580 (W.D. Okla. 1971); Williams v. Tri-County Community Center, supra; see Jerro v. Home Lines, Inc., 377 F.Supp. 670 (S.D. N.Y. 1974). The provisions of the statutes authorizing removal, in that they represent congressionally-authorized encroachments into state sovereignty, are to be strictly construed. Town of Freedom v. Muskogee Bridge Co., 466 F.Supp. 75 (W.D. Okla. 1978); Lee v. Volkswagen of America, Inc., 429 F.Supp. 5 (W.D. Okla. 1976).

The policy of 28 U.S.C. §1359 is against assignment or joinder for the purpose of creating diversity jurisdiction; there is, however, no comparable policy against manipulations designed to defeat diversity jurisdiction. See generally 14 Wright & Miller §3641; 1A Moore's Federal Practice ¶0.158. The leading authority on this point is Mecom v. Fitzimmons Drilling Co., 284 U.S. 183 (1931). There the court, at 284 U.S. 190, said:

The case comes to no more than this: There being, under Oklahoma law, a right to have a nonresident appointed administrator, the parties in interest lawfully applied to an Oklahoma court, and petitioner was appointed administrator, with the result that the cause of action for the wrongful death of the decedent vested in him. His citizenship being the same as that of one of the defendants, there was no right of removal to the federal court; and it is immaterial that the motive for obtaining his appointment and qualification was that he might thus be clothed with a right to institute an action which could not be so removed on the ground of diversity of citizenship.

The language applies with equal force to the appointment of a co-administrator. In Herrick v. Pioneer Gas Products Co., 429 F.Supp. 80 (W.D. Okla. 1976), a Texas citizen was appointed co-administrator with the decedent's wife, who was an Oklahoma citizen. The Defendant, a Texas corporation, removed the action, but the court, finding that there was a lack of complete diversity, remanded. In Hudgens v. Cook Industries, Inc., supra, a Tennessee co-guardian was appointed, and, since the Defendant corporation was a Tennessee corporation, the case was remanded.

In the instant case, Plaintiff Westmoreland, is a citizen

of the State of Georgia, as is Defendant Thomaston Cotton Mills, Inc. Accordingly, the Court concludes that this case must be remanded as there is a lack of complete diversity of citizenship between the parties herein. The Court finds that removal of this action was improvident, and that this case should be remanded to the state court from which it was removed. 28 U.S.C. §1447(c).

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Remand be, and the same hereby is, granted, and the Court remands this case to the State District Court of Okmulgee County, Oklahoma.

The Clerk of the Court is hereby directed to take forthwith the necessary action to effect the remand of this case.

It is so Ordered this 4<sup>th</sup> day of <sup>January</sup>~~December~~, 1979<sup>80</sup>.

  
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LAURA BELLE MCMAHAN,

Plaintiff,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY  
COMPANY, a corporation,

Defendant.

No. 79-C-129 ✓

STIPULATION FOR DISMISSAL WITH PREJUDICE  
OF PLAINTIFF'S CAUSE OF ACTION

The parties hereto stipulate that they have entered into a settlement agreement in this case and that plaintiff's cause of action against the defendant should be dismissed with prejudice to further filing, at plaintiff's costs.

KIGHT & SIBLEY  
MALLOY, THOMPSON & MALLOY

By

Patrick J. Malloy III  
Patrick J. Malloy III  
Attorneys for Plaintiff

FILED

JAN 4 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

FRANKLIN, HARMON & SATTERFIELD, INC.

By

Ben Franklin  
Ben Franklin  
Attorneys for Defendant

O R D E R

Upon stipulation of the parties, and for good cause shown, plaintiff's cause of action is ordered dismissed with prejudice to further filing, at plaintiff's costs.

IT IS SO ORDERED this 14<sup>th</sup> day of January, 1980.

James O. Ellison  
James O. Ellison, U. S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

LARRY TODD, individually and as )  
Natural Father and Legal Guardian )  
of GARY TODD, a minor, )

Plaintiff, )

v. )

SOUTHWESTERN BELL TELEPHONE )  
COMPANY, a corporation, )

Defendant. )

212 ✓  
No. 79-C-~~292~~-~~DET~~

FILED

JAN 3 - 1980

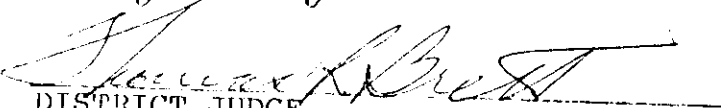
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER APPROVING SETTLEMENT  
TERMS AND DISMISSING THE ACTION  
WITH PREJUDICE

The Court, having received the Joint Stipulations and Joint Request for Court's Approval of Settlement of Action and For Dismissal, filed by both parties herein, and having reviewed the pleadings and other instruments of record herein, and upon advice of both counsel of record herein, hereby approves the terms of settlement as set forth in said Joint Stipulations, and finds that the action should be dismissed.

Therefore, IT IS ORDERED that the action herein be, and hereby is, DISMISSED with prejudice to the bringing of a future action thereon, each party to bear his or its costs.

Dated this 3<sup>rd</sup> day of January, 1980.

  
DISTRICT JUDGE



FILED  
UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAN 2 1980

MIX-MILL, INC.

Plaintiff,

vs.

WE-CO, INC.

Defendant.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 79-C-67-~~AE~~

STIPULATION AND ORDER  
OF DISMISSAL WITH PREJUDICE

That Plaintiff and Defendant, having stated that the above-entitled action, and each and every claim for relief asserted therein by Plaintiff, may be dismissed with prejudice, each party to bear its, his or her own costs, and the Court being fully advised,

IT IS ORDERED that this cause of action and complaint, each and every claim for relief asserted therein be and the same are hereby dismissed with prejudice to bringing of a future action thereon, and that each party hereto shall bear its, his or her own costs.

DATED this 2nd day of Jan, 1980

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

NOTE: THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LIBERTY-HELLER FACTORS, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Defendant. )

No. 79-C-572-BT ✓

**FILED**

JAN 2 - 1979 / 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT


On this 27th day of December, 1979, this matter came before the Court upon plaintiff's Motion for Summary Judgment, plaintiff being represented by Glenn M. Ford, and defendant being represented by Eleanor Thompson, Assistant U. S. Attorney, and the issues having been duly heard and a decision having been duly rendered,

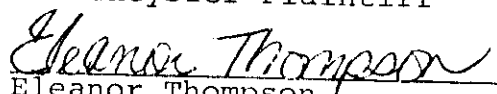
IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Liberty-Heller Factors, Inc. recover of the defendant, United States of America, the sum of \$16,575.03, with interest accruing thereon at the daily rate of \$9.64 from this date, and plaintiff's cost of action.

Dated at Tulsa, Oklahoma, this 27th day of December, 1979.

  
United States District Judge

Approved as to form:

  
Glenn M. Ford  
GABLE, GOTWALS, RUBIN, FOX,  
JOHNSON & BAKER  
20th Floor, Fourth National Bldg.  
Tulsa, OK 74119 (918) 582-9201  
Attorneys for Plaintiff

  
Eleanor Thompson  
Assistant United States Attorney  
U. S. Attorney's Office  
Page Belcher Federal Building  
Tulsa, OK 74103  
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT OF  
THE NORTHERN DISTRICT OF OKLAHOMA

SAMUEL BARNES,

Plaintiff,

-vs-

WESTERN ELECTRIC COMPANY,

Defendants.

)  
)  
)  
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)  
)  
)  
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)

No. 78-C-588-C

FILED

JAN 1 - 1980

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

On the foregoing stipulation of the parties herein, filed on  
December the 28<sup>th</sup>, 1979, and on the motion of Plaintiff, by his  
attorney of record,

It is hereby Ordered that the above entitled action be, and it  
is hereby dismissed with prejudice without costs in favor of or against  
either party.

Dated this 31<sup>st</sup> day of December, 1979.

S/ THOMAS R. BRETT

JUDGE OF THE DISTRICT COURT